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United Nations

Report of the Human Rights Committee

Volume II

Eighty-fifth session
(17 October-3 November 2005)
Eighty-sixth session
(13-31 March 2006)
Eighty-seventh session
(10-28 July 2006)

General Assembly
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Note

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VII. FOLLOW-UP OF THE HUMAN RIGHTS COMMITTEE ON INDIVIDUAL COMMUNICATIONS UNDER THE OPTIONAL PROTOCOL TO THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS 684

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VIEWS OF THE HUMAN RIGHTS COMMITTEE UNDER ARTICLE 5, PARAGRAPH 4, OF THE OPTIONAL PROTOCOL TO THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS

A. Communication No. 812/1998, *Persaud v. Guyana* (Views adopted on 21 March 2006, eighty-sixth session)*

Submitted by:	Raymond Persaud and Rampersaud (not represented by counsel)
Alleged victim:	The authors
State party:	Guyana[1]
Date of communication:	26 February 1998 (initial submission)
Subject matter:	Death row phenomenon - Mandatory imposition of the death penalty
Procedural issues:	State party's failure to cooperate
Substantive issues:	Arbitrary deprivation of life
Articles of the Covenant:	6 and 7
Articles of the Optional Protocol:	2 and 4, paragraph 2

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 21 March 2006,

Having concluded its consideration of communication No. 812/1998, submitted to the Human Rights Committee by Raymond Persaud and Rampersaud under the Optional Protocol to the International Covenant on Civil and Political Rights,

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* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Nisuke Ando, Mr. Prafullachandra Natwarlal Bhagwati, Ms. Christine Chanet, Mr. Maurice Glèlè Ahanhanzo, Mr. Edwin Johnson, Mr. Walter Kälin, Mr. Ahmed Tawfik Khalil, Mr. Rajsoomer Lallah, Mr. Michael O'Flaherty, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Ivan Shearer, Mr. Hipólito Solari-Yrigoyen, Ms. Ruth Wedgwood and Mr. Roman Wieruszewski.

An individual opinion co-signed by Committee members Mr. Hipólito Solari-Yrigoyen and Mr. Edwin Johnson is appended to the present document.

Having taken into account all written information made available to it by the author of the communication, and the State party,

Adopts the following:

Views under article 5, paragraph 4, of the Optional Protocol

1.1 The authors are Raymond Persaud and Rampersaud, nationals of Guyana. Raymond Persaud is currently detained in Georgetown Prisons and awaiting execution. Rampersaud died on 21 August 1998 (of natural causes) and the Committee has received no notification from any of his heirs that his communication is maintained. Although the authors do not invoke any specific provisions of the International Covenant on Civil and Political Rights, the communication appears to raise issues under articles 6 and 7 of the Covenant. The authors are not represented by counsel.

1.2 In accordance with rule 92 (former rule 86) of the Committee's rules of procedure, the Committee, through its Special Rapporteur on new communications, requested the State party on 9 April 1998 not to carry out the death sentence against the authors, to make it possible for the Committee to examine the communication.

Factual background

2.1 On 21 January 1986, the authors were arrested for the murder of Bibi Zorina Alli, who was found buried in a shallow grave at the back of the Hollywood Hotel in Rose Hall, Corentyne. They were found guilty of the murder and were sentenced to death on 11 December 1990. The authors appealed and on 25 May 1994, the Court of Appeal confirmed their death sentences. They applied to have their sentences commuted to life sentences, but their application was dismissed on 31 July 1997. They lodged an appeal against this decision, which was dismissed on 25 February 1998.

2.2 On 16 or 17 July 1998, warrants of execution were mistakenly issued and read to the authors, because the Office of the President had not been notified that interim measures had been granted by the Committee. The warrants were withdrawn and the authors subsequently received letters of apology for the mistake.

The complaint

3. The authors claim that their death sentences should be commuted to life sentences as a result of their long delay on death row. By letter received on 14 January 2004 from the brother and sister of the remaining living author, Raymond Persaud, on his behalf, he claims that his remaining on death row is inhumane and that the delay amounts to a violation of his fundamental rights. The communication therefore raises issues under articles 6 and 7 of the Covenant.

Submission by the State party on the admissibility of the communication

4. By letter of 30 June 1998, the State party conceded that the communication was admissible since the authors had exhausted all available domestic remedies.

State party's failure to cooperate

5. On 14 December 2000, 24 July 2001, 21 October 2003 and 7 July 2004, the State party was requested to submit to the Committee information on the merits of the communication. The Committee notes that this information has not been received; it regrets the State party's failure to provide any information with regard to the substance of the authors' claims. It recalls that it is implicit in article 4, paragraph 2, of the Optional Protocol that States parties examine all the allegations brought against them, and that they make available to the Committee all information at their disposal. In the absence of a reply from the State party, due weight must be given to the authors' allegations, to the extent that these have been properly substantiated.

Issues and proceedings before the Committee

Consideration of admissibility

6.1 Before considering any claim contained in a communication, the Human Rights Committee must, in accordance with article 93 of its rules and procedures, decide whether or not it is admissible under the Optional Protocol of the Covenant.

6.2 The Committee has ascertained that the same matter is not being examined under another procedure of international investigation or settlement for the purposes of article 5, paragraph 2 (a), of the Optional Protocol and that the authors have exhausted all domestic remedies, in accordance with article 5, paragraph 2 (b), of the Optional Protocol. In the present case, the Committee further notes that the State party, in its submission of 30 June 1998, does not contest the admissibility of the communication. Accordingly, the Committee proceeds directly with the examination of the merits.

Consideration of the merits

7.1 The Human Rights Committee has considered the present communication in the light of all the information made available to it, as provided under article 5, paragraph 1, of the Optional Protocol.

7.2 As regards the issues under article 6 of the Covenant, and basing itself on the examination of the applicable law in Guyana, the Committee presumes that the death sentence was passed automatically by the trial court, once the jury had rendered its verdict that the authors were guilty of murder, in application of section 101 of the Criminal Law (Offences) Act. This provision requires that "Everyone who commits murder shall be guilty of felony and liable to suffer death as a felon", without regard being able to be paid to the defendant's personal circumstances or the circumstances of the particular offence. The Committee refers to its jurisprudence that the automatic and mandatory imposition of the death penalty constitutes an arbitrary deprivation of life, in violation of article 6, paragraph 1, of the Covenant, in circumstances where the death penalty is imposed without regard being able to be paid to the defendant's personal circumstances or the circumstances of the particular offence.[2] It follows that the automatic imposition of the death penalty on the authors violated their rights under article 6, paragraph 1.

7.3 As regards the issues raised under article 7 of the Covenant, the Committee would be prepared to consider that the prolonged detention of the author on death row constitutes a violation of article 7. However, having also found a violation of article 6, paragraph 1, it does not consider it necessary in the present case to review and reconsider its jurisprudence that prolonged detention on death row, in itself and in the absence of other compelling circumstances, does not constitute a violation of article 7.

8. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts before it reveal violations by the State party of article 6, paragraph 1, of the Covenant.

9. In accordance with article 2, paragraph 3, of the Covenant, the State party is under an obligation to provide the remaining living author with an effective remedy, including commutation of his death sentence. The State party is also under an obligation to take measures to prevent similar violations in the future.

10. Bearing in mind that, by becoming a party to the Optional Protocol, the State party has recognized the competence of the Committee to determine whether there has been a violation of the Covenant or not and that, pursuant to article 2 of the Covenant, that State party has undertaken to ensure all individuals within its territory or subject to its jurisdiction the rights recognized in the Covenant and to provide an effective and enforceable remedy in case a violation has been established, the Committee wishes to receive from the State party, within 90 days, information about the measures taken to give effect to the Committee's Views. The State party is also requested to publish the Committee's Views.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the Committee's annual report to the General Assembly.]

Notes

[1] The Covenant and the Optional Protocol entered into force for the State party respectively on 15 May 1977 and 10 August 1993. On 5 January 1999, the State party notified the Secretary-General that it had decided to denounce the Optional Protocol with effect from 5 April 1999, that is, subsequent to the initial submission of the communication. On the same date, the State party re-acceded to the Optional Protocol with the following reservation: "[...] Guyana re-accedes to the Optional Protocol to the International Covenant on Civil and Political Rights with a Reservation to article 6 thereof with the result that the Human Rights Committee shall not be competent to receive and consider communications from any person who is under sentence of death for the offences of murder and treason in respect of any matter relating to his prosecution, detention, trial, conviction, sentence or execution of the death sentence and any matter connected therewith.

Accepting the principle that States cannot generally use the Optional Protocol as a vehicle to enter reservations to the International Covenant on Civil and Political Rights itself, the Government of Guyana stresses that its Reservation to the Optional Protocol in no way detracts from its obligations and engagements under the Covenant, including its undertaking to respect and ensure to all individuals within the territory of Guyana and subject to its jurisdiction the rights recognized in the Covenant (insofar as not already reserved against) as set out in article 2 thereof, as well as its undertaking to report to the Human Rights Committee under the monitoring mechanism established by article 40 thereof."

[2] See communication No. 806/1998, *Thompson v. St. Vincent and The Grenadines*, Views adopted on 18 October 2000, paragraph 8.2; communication No. 845/1998, *Kennedy v. Trinidad and Tobago*, Views adopted on 26 March 2002, paragraph 7.3; communication No. 1077/2002, *Carpo et al. v. Philippines*, Views adopted on 28 March 2003, paragraph 8.3; communication No. 1167/2003, *Ramil Rayos v. Philippines*, Views adopted on 27 July 2004, paragraph 7.2; communication No. 862/1999, *Hussain et al. v. Guyana*, Views adopted on 25 October 2005, paragraph 6.2; and communication No. 913/2000, *Chan v. Guyana*, Views adopted on 31 October 2005, paragraph 6.5.

APPENDIX

Dissenting opinion by Committee members Mr. Hipólito Solari-Yrigoyen and Mr. Edwin Johnson

I disagree with the majority view that it is unnecessary in the present case for the Committee to reconsider its jurisprudence, which has, to date, held - wrongly, in my view - that prolonged detention on death row does not, in itself, constitute a violation of article 7 of the Covenant.

Although the Committee has rightly concluded that there has been a violation of article 6, it is my view that, in a case in which the death sentence was imposed, we have an obligation not to disregard the specific claim by the author that his prolonged stay on death row amounts to a violation of his fundamental rights; and that we are thus bound to rule on the claim.

Consequently, taking into account the circumstances of this case, in which the author of the communication has spent 15 years on death row, I am of the view that this fact alone constitutes cruel, inhuman and degrading treatment and that article 7 of the Covenant has been violated.

Accordingly, the facts before the Committee reveal violations by the State party both of article 6 and of article 7 of the Covenant.

In accordance with article 2, paragraph 3, of the Covenant, the State party is under an obligation to provide the author with an effective remedy, including commutation of his death sentence and the possibility of his being granted his freedom.

(*Signed*): Hipólito Solari-Yrigoyen

(*Signed*): Edwin Johnson

[Done in English, French and Spanish, the Spanish text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the Committee's annual report to the General Assembly.]

B. Communication No. 862/1999, *Hussain & Hussain v. Guyana* (Views adopted on 25 October 2005, eighty-fifth session)*

Submitted by:	Hazerat Hussain and Sumintra Singh
Alleged victims:	Hafeez Hussain, Hazerat Hussain, Vivakanand Singh and Tola Persaud
State party:	Guyana[1]
Date of communications:	16 and 22 March 1999 (initial submissions)
Subject matter:	Mandatory imposition of the death penalty
Substantive issues:	Arbitrary deprivation of life - deprivation of life consistent with Covenant - fairness of trial
Procedural issues:	Failure by State party to supply submissions - exhaustion of domestic remedies - sufficient substantiation, for purposes of admissibility
Articles of the Covenant	6, paragraphs 1 and 2, and 14, paragraph 1
Articles of the Optional Protocol:	3 and 5, paragraph 2 (b)

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 25 October 2005,

Having concluded its consideration of communication No. 862/1999, submitted to the Human Rights Committee on behalf of Sumintra Singh and Hazerat Hussain under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the author of the communication, and the State party,

Adopts the following:

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* The following members of the Committee participated in the examination of the present communication: Mr. Nisuke Ando, Mr. Prafullachandra Natwarlal Bhagwati, Mr. Alfredo Castillero Hoyos, Mr. Maurice Glèlè Ahanhanzo, Mr. Edwin Johnson, Mr. Walter Kälin, Mr. Ahmed Tawfik Khalil, Mr. Michael O'Flaherty, Ms. Elisabeth Palm, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Ivan Shearer, Mr. Hipólito Solari-Yrigoyen and Mr. Roman Wieruszewski.

Views under article 5, paragraph 4, of the Optional Protocol

1.1 The authors are Messrs. Hazerat Hussain and Sumintra Singh, two nationals of Guyana. Mr. Hazerat submits the communication on behalf of himself and three other Guyanese nationals, Hafeez Hussain, Vivakanand Singh and Tola Persaud, also Guyanese nationals imprisoned at the time of the communication. Mr. Sumintra Singh submits the communication exclusively on behalf of his son, Mr. Vivakand Singh. At the time of submission of the communication, Mr. Hafeez Hussain and Mr. Vivakanand Singh were awaiting execution. While the authors do not invoke any specific provisions of the International Covenant on Civil and Political Rights, the communication appears to raise issues under articles 6 and 14 the Covenant. The alleged victims are not represented.

1.2 In accordance with rule 92 of the Committee's rules of procedure, the Committee through its Special Rapporteur on new communications, requested the State party on 22 April 1999 not to carry out the death sentence against Mr. Hussain and Mr. Singh, while their cases were under consideration by the Committee.

Factual background

2. On 1 September 1993, Arnold Ramsammy was robbed and shot dead in his house. All four alleged perpetrators were arrested between 3 and 4 September 1993 in relation to the crime. On 26 March 1996, Hafeez Hussain and Vivakanand Singh were convicted of murder. Pursuant to article 101 of the Laws of Guyana: Criminal Law (Offences), which provides that "Everyone who commits murder shall be guilty of felony and liable to suffer death as a felon", the Magistrate's Court of the Corentyne District automatically imposed the death sentence. On the same date, Hazrath Hussain and Tola Persaud were convicted of manslaughter and sentenced to two years and three years of imprisonment, respectively. In March of 1996, the four accused appealed their convictions to the Court of Appeal. The grounds of appeal were, inter alia, that the trial judge omitted to direct the jury adequately on the law relating to identification, and that he did not adequately deal with the effects the evidentiary statements said to be inconsistent.

The complaint

3. The authors claim that the trial in Corentyne District Court, following which they were automatically sentenced to death, was unfair. They argue inter alia that the police daily-record book which contained entries about the "real" authors of the crime was lost during the trial; that some testimonies of witnesses were not taken into account while a police officer's contradictory testimony, as well as other testimonies with significant discrepancies, were used against the accused; that the trial judge did not direct the jury how to approach these issues, in particular the reliability of evidentiary testimonies; that the officer-in-charge of the investigation, who was related to the deceased, had a conflict of interest so that, according to the authors, his findings were partial; and that the guilty verdict was reached even after the appellate judges allegedly commented that the case was "a fabrication".

Failure of State party to cooperate

4. On 22 April 1999, 18 December 2000 and 24 July 2001, the State party was requested to submit to the Committee information on the admissibility and merits of the communication. The

Committee notes that this information has not been received. The Committee regrets the State party's failure to provide any information with regard to the admissibility or the substance of the authors' claims. It recalls that it is implicit in article 4, paragraph 2, of the Optional Protocol that States parties examine in good faith all the allegations brought against them, and that they make available to the Committee all information at their disposal. In the absence of a reply from the State party, due weight must be given to the authors' allegations, to the extent that they have been properly substantiated.

Issues and proceedings before the Committee

Consideration of admissibility

5.1 Before considering any claim contained in a communication, the Human Rights Committee must, in accordance with article 93 of its rules of procedure, decide whether or not it is admissible under the Optional Protocol to the Covenant.

5.2 The Committee has ascertained that the same matter is not being examined under another procedure of international investigation or settlement (article 5, paragraph 2 (a), of the Optional Protocol).

5.3 On the issue of exhaustion of domestic remedies, the Committee notes that the alleged victims appealed their convictions to the Court of Appeal, the court of final appeal in the State party, although the outcome of the appeal is not apparent from the material before the Committee. In the absence of arguments from the State party to the effect that domestic remedies had not in fact been exhausted, it follows that the Committee is not precluded from article 5, paragraph 2 (b), of the Optional Protocol from consideration of the communication.

5.4 As to the issues of unfair trial raised by the authors, the Committee notes that this part of the authors' allegations relate to the evaluation of evidence and to the instructions given by the judge to the jury. The Committee recalls its jurisprudence and reiterates that it is generally for the courts of States parties to the Covenant to evaluate facts and evidence in a particular case.[2] Similarly, it is not for the Committee to review specific instructions to the jury by the trial judge, unless it can be ascertained that the instructions to the jury were clearly arbitrary or amounted to a denial of justice.[3] On the material before it, the Committee cannot establish that the trial judge's instructions or the conduct of the trial suffered from such deficiencies as to raise issues under the provisions of the Covenant. Accordingly, this part of the communication is insufficiently substantiated, for purposes of admissibility, and is inadmissible under article 2 of the Optional Protocol.

5.5 The Committee considers, however, that the issue of the mandatory imposition of the death sentence on Messrs. Hafeez Hussain and Vivakanand Singh raises sufficiently substantiated issues under article 6 of the Covenant and proceeds to examine this matter on the merits.

Consideration of the merits

6.1 The Human Rights Committee has considered the present communication in the light of all the information made available to it by the parties, as provided under article 5, paragraph 1, of the Optional Protocol.

6.2 The Committee notes that, with respect to Messrs. Hafeez Hussain and Vivakanand Singh, the death sentence was passed by the trial court automatically, once the jury rendered its verdict that those accused were guilty of murder. In doing so, the trial court applied the provisions of article 101 of the Laws of Guyana: Criminal Law (Offences), which provides that "Everyone who commits murder shall be guilty of felony and liable to suffer death as a felon." Article 101 of the Criminal Law therefore was applied automatically without regard being able to be paid to the defendant's personal circumstances or the circumstances of the particular offence or facts and evidence of each individual case. The Committee refers to its jurisprudence that the automatic and mandatory imposition of the death penalty constitutes an arbitrary deprivation of life, in violation of article 6, paragraph 1, of the Covenant, in circumstances where the death penalty is imposed without regard being able to be paid to the defendant's personal circumstances or the circumstances of the particular offence.[4] It follows that the automatic imposition of the death penalty in the authors' cases violated their rights under article 6, paragraph 1, of the Covenant.

6.3 The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts before it reveal violations by the State party of article 6, paragraph 1 of the Covenant.

7. In accordance with article 2, paragraph 3 (a), of the Covenant, the State party is under an obligation to provide Messrs. Hafeez Hussain and Vivakanand Singh with an effective remedy, including commutation of their death sentence.

8. Bearing in mind that, by becoming a State party to the Optional Protocol, the State party has recognized the competence of the Committee to determine whether there has been a violation of the Covenant or not. Pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the Covenant and to provide an effective and enforceable remedy in case a violation has been established, the Committee wishes to receive from the State party, within 90 days, information about any measures taken to give effect to the Committee's Views.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the Committee's annual report to the General Assembly.]

Notes

[1] Guyana denounced the Optional Protocol on 5 January 1999 and re-acceded to it on the same date with a reservation related to the competence of the Committee to examine death penalty cases. The reservation became effective on 5 April 1999.

[2] See *Errol Simms v. Jamaica* case No. 541/1993, Decision adopted on 3 April 1995; *Lyndon Marriott v. Jamaica* case No. 519/1992,Views adopted on 27 October 1995, at para. 6.3; and *Catalina Marín Contreras v. Spain* case No. 1099/2002 Decision adopted on 17 March 2005.

[3] See *Lloyd Reece v. Jamaica* case No. 796/1998,Views adopted on 14 July 2003, at para. 7.3.

[4] See *Thompson v. St. Vincent & The Grenadines* (case No. 806/1998), Views adopted on 18 October 2000; and *Kennedy v. Trinidad & Tobago* (case No. 845/1998), Views adopted on 26 March 2002; *Carpo et al. v. Philippines* case No. 1077/2002, Views adopted on 28 March 2003; *Ramil Rayos v. Philippines* case No. 1167/2003, Views adopted on 27 July 2004.

C. Communication No. 889/1999, *Zheikov v. Russian Federation* (Views adopted on 17 March 2006, eighty-sixth session)*

Submitted by:	Valentin Zheikov (not represented by counsel)
Alleged victim:	The author
State party:	Russian Federation
Date of communication:	10 August 1998 (initial submission)
Subject matter:	Unsuccessful attempt of Russian citizen to see criminal proceedings instituted
Substantive issues:	Torture, degrading treatment or punishment, right to humane treatment and respect for dignity
Procedural issues:	None
Articles of the Covenant:	2, 7, 10, paragraph 1
Articles of the Optional Protocol:	None

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 17 March 2006,

Having concluded its consideration of communication No. 889/1999, submitted to the Human Rights Committee by Valentin Zheikov under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the author of the communication, and the State party,

Adopts the following:

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* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Nisuke Ando, Mr. Prafullachandra Natwarlal Bhagwati, Ms. Christine Chanet, Mr. Maurice Glèlè Ahanhanzo, Mr. Edwin Johnson, Mr. Walter Kälin, Mr. Ahmed Tawfik Khalil, Mr. Rajsoomer Lallah, Mr. Michael O'Flaherty, Ms. Elisabeth Palm, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Ivan Shearer, Mr. Hipólito Solari-Yrigoyen, Ms. Ruth Wedgwood and Mr. Roman Wieruszewski.

Views under article 5, paragraph 4, of the Optional Protocol

1. The author of the communication is Valentin Zheikov, a Russian citizen born in 1947. He claims to be a victim of violations by the Russian Federation[1] of articles 7 and 10 of the International Covenant on Civil and Political Rights. He is unrepresented.

Factual background

2.1 In the evening of 20 February 1996, at around 8 p.m., the author was pushed down the stairs of a bathhouse in Tula by a man wearing a khaki suit. The author lost his balance and fell. At 9.30 p.m. he attempted to re-enter the bathhouse but was prevented from doing so by two men in civilian clothes. They asked him to follow them and took him to the local police station, allegedly hitting him on his back. At the station, he was searched and allegedly beaten on his head, groin and spleen area, so that he lost consciousness. He was later delivered to the Proletarskiy District Office of Internal Affairs, where he asked for and was brought an ambulance. The author allegedly refused to go to the hospital, as he wanted to take some documents from a duty officer. At 5 a.m. on 21 February 1996, he left for home. He called an ambulance for a second time on 23 February 1996. As a result of the injuries sustained, he was hospitalized several times and diagnosed as suffering from craniocerebral trauma and hydrocephalic hypertension.

2.2 On 22 February 1996, he filed a complaint with the Proletarskiy District Office of Internal Affairs of Tula. On 14 March 1996, this Office decided not to institute criminal proceedings, because of lack of evidence. This decision was annulled as unfounded by the prosecutor of Proletarskiy District Prosecutor Office of Tula. On 7 April 1996, the investigator of this Office once again decided not to institute criminal proceedings, as there was insufficient evidence that a crime had been committed. He found that on 20 February 1996, the author had been drunk and behaved in a disorderly manner at the bathhouse. He had verbally abused a woman working at the bathhouse, whereupon two off-duty officers of the Proletarskiy District Office of Internal Affairs present removed him from the scene. A duty officer at the police station testified that at approximately 10:30 p.m. on 20 February 1996, the author, who was then heavily intoxicated, was brought to the station. While the duty officer drew up registration documents, the author refused to provide personal data and started to behave in a provocative manner which necessitated the use of force against him. The officer testified that he had to apply force because Zheikov ignored all verbal orders because of his intoxication. The investigator concluded that the duty officer had acted in compliance with articles 12 and 13 of the Law governing the militia that allowed militia officers to apply physical force to detain persons that committed an administrative offence. He concluded that the author was detained while committing an administrative offence, and had sought to use force against the duty officer.

2.3 On numerous occasions, the author requested the Prosecutor's office of Tula Region to institute criminal proceedings, but all criminal cases opened by the office were subsequently closed by the same office, on the ground that there was insufficient evidence that a crime had been committed. In addition, the author addressed himself to the Office of the General Prosecutor, which on four occasions annulled the decision of the Prosecutor's office of Tula Region to close the criminal case.

The complaint

3. The author claims that the State party violated his rights under articles 7 and 10 of the Covenant, and that it failed to take any steps to punish those responsible for causing bodily injury to him.

State party's observations on admissibility and merits and author's comments

4. By note verbale dated 12 July 2000, State party advised that the Office of the General Prosecutor of the Russian Federation had conducted an inquiry into the facts at the basis of the author's complaint to the Committee. It determined that the decision to close criminal proceedings initiated to investigate the author's allegations was unfounded and referred it to the Prosecutor's office of Tula Region for further investigation. The State party added that the Office of the General Prosecutor was monitoring, at that time, the conduct of the investigation and its outcome.

5. On 5 October 2000, the author transmitted a letter from the Prosecutor's office of Tula Region dated 29 September 2000, by which he was informed that the criminal case was suspended as the investigation had exhausted all possibilities of identifying the culprits responsible for the treatment of the author. The author added offensive remarks addressed to the Committee and the United Nations in general, related to their alleged inability effectively to assist him. In a letter with similarly offensive language received on 10 October 2000, he claimed that on 22 June 1999, officers of the Ministry of Internal Affairs had hit him on the head, insulted him and subjected him to torture. On 22 February 2001, the author forwarded a copy of a letter with insults addressed to the General Prosecutor of the Russian Federation. On 10 August 2001, he provided a document allegedly certifying that he had been recognized as a disabled person, with physical handicaps, third category. On 26 November 2005, the author informed the Committee that he would be satisfied by compensation totalling US$ 18 billion for injuries suffered, as well as moral harm and material damages.[2]

Issues and proceedings before the Committee

Consideration of admissibility

6.1 Before considering any claim contained in a communication, the Human Rights Committee must, in accordance with rule 93 of its rules of procedure, decide whether or not the case is admissible under the Optional Protocol to the Covenant.

6.2 The Committee has ascertained, as required under article 5, paragraph 2 (a), of the Optional Protocol, that the same matter is not being examined under another procedure of international investigation or settlement. As to the requirement of the exhaustion of domestic remedies, the Committee has noted that according to the information submitted by the author, all available domestic remedies have been exhausted. In the absence of any pertinent information from the State party, the Committee considers that the requirements of article 5, paragraph 2 (b), of the Optional Protocol have been met.

6.3 The Committee considers there to be no impediment to the admissibility of the author's claims under articles 7 and 10 of the Covenant.

Consideration of the merits

7.1 The Human Rights Committee has considered the communication in the light of all the information made available to it by the parties, as provided under article 5, paragraph 1, of the Optional Protocol. It further notes that the State party advised that the General Prosecutor Office had conducted an inquiry into the facts of the author's complaint to the Committee, determined that the decision to close criminal proceeding initiated to investigate the author's allegations was unfounded and referred it for further investigation. The State party has not, however, challenged the facts as submitted by the author, and has not provided any pertinent information about the substance of the author's claims.

7.2 The Committee has noted the author's claim that on 20 February 1996, he was ill-treated by person(s) acting in an official capacity (see paragraphs 2.1, 2.2 and 5.1 above). The State party's prosecutorial authorities have conducted several investigations into the author's allegations, which confirmed that he was detained and acknowledged that physical force was applied to him in accordance with the law (paragraph 2.2). The Committee recalls that a State party is responsible for the security of any person it deprives of liberty and, where an individual deprived of liberty receives injuries in detention, it is incumbent on the State party to provide a plausible explanation of how these injuries occurred and to produce evidence refuting these allegations.[3] It also recalls its jurisprudence[4] that the burden of proof cannot rest alone on the author of the communication, especially considering that the author and the State party do not always have equal access to the evidence and that frequently the State party alone has access to relevant information. It is implicit in article 4 (2) of the Optional Protocol that the State party has the duty to investigate in good faith all allegations of violation of the Covenant made against it and its authorities, and to furnish to the Committee the information available to it. In this case, the State party does not deny that force was used against the author, and that investigations have thus far failed to identify those responsible (para. 5) although the resolution of 7 April 1996 mentioned the names of the duty officers, and that the author has not been afforded an effective remedy, in form of proper investigations into his treatment. The Committee thus concludes that the lack of adequate investigation into the author's allegations of ill-treatment amounted to a violation of article 7 of the Covenant, read together with article 2. In the light of this finding, it is unnecessary to examine the author's allegation of a violation of article 10, paragraph 1.

8. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts before it disclose a violation of article 7, read together with article 2, of the Covenant.

9. In accordance with article 2, paragraph 3, of the Covenant, the author is entitled to an effective remedy, including completion of the investigation into the author's treatment, if still pending, as well as compensation. The State party is also under an obligation to take measures to prevent similar violations in the future.

10. Bearing in mind that, by becoming a party to the Optional Protocol, the State party has recognized the competence of the Committee to determine whether there has been a violation of the Covenant or not and that, pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory or subject to its jurisdiction the rights recognized in the Covenant and to provide an effective and enforceable remedy in case a

violation has been established, the Committee wishes to receive from the State party, within 90 days, information about the measures taken to give effect to the Committee's Views. The State party is also requested to publish the Committee's Views.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the Committee's annual report to the General Assembly.]

Notes

[1] The Optional Protocol entered into force for the Russian Federation on 1 January 1992.

[2] This submission was not transmitted to the State party.

[3] *Siragev v. Uzbekistan*, communication No. 907/2000, Views adopted on 1 November 2005, para. 6.2.

[4] *Bleier v. Uruguay*, communication No. 30/1978, Views adopted on 24 March 1980, para. 13.3, *Dermit Berbato et al. v. Uruguay*, communication No. 84/1981, Views adopted on 21 October 1982, para. 9.6.

D. Communication No. 907/2000, *Siragev v. Uzbekistan*
(Views adopted on 1 November 2005, eighty-fifth session)*

Submitted by: Nazira Sirageva (not represented by counsel)

Alleged victim: Mr. Danis Siragev, the author's son

State party: Uzbekistan

Date of communication: 12 December 1999 (initial submission)

Subject matter: Death sentence after an unfair trial

Procedural issues: None

Substantive issues: Right to have adequate time and facilities to prepare one's defence and to communicate with counsel; death sentence pronounced after an unfair trial

Articles of the Covenant: 2, paragraph 3 (a); 6; 7; 10, paragraph 1; 14, paragraphs 3 (b), (d), (e), and (g); and 15, paragraph 1

Articles of the Optional Protocol: 2 and 5, paragraph 2 (a)

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 1 November 2005,

Having concluded its consideration of communication No. 907/2000, submitted to the Human Rights Committee on behalf of Mr. Danis Siragev under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the author of the communication, and the State party,

Adopts the following:

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* The following members of the Committee participated in the examination of the present communication: Mr. Nisuke Ando, Mr. Prafullachandra Natwarlal Bhagwati, Mr. Alfredo Castillero Hoyos, Ms. Christine Chanet, Mr. Maurice Glèlè Ahanhanzo, Mr. Edwin Johnson, Mr. Walter Kälin, Mr. Ahmed Tawfik Khalil, Mr. Rajsoomer Lallah, Mr. Michael O'Flaherty, Ms. Elisabeth Palm, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Ivan Shearer, Mr. Hipólito Solari-Yrigoyen, Ms. Ruth Wedgwood and Mr. Roman Wieruszewski.

Views under article 5, paragraph 4, of the Optional Protocol

1.1 The author of the communication is Mrs. Nazrira Sirageva, an Uzbek national of Tatar origin, currently residing in France. She submits the communication on behalf of her son, Danis Siragev, an Uzbek national of Tatar origin born in 1975, who at the time of submission of the communication was under sentence of death and detained and awaiting execution in Tashkent. The author claims that her son is a victim of violations by Uzbekistan of articles 2, paragraph 3 (a); 6; 7; 10, paragraph 1; 14, paragraphs 3 (b), (d), (e), and (g); and 15, paragraph 1, of the International Covenant on Civil and Political Rights.[1] She is not represented by counsel.

1.2 Under rule 92 (old rule 86) of its rules of procedure, the Committee, acting through its Special Rapporteur on new communications and interim measures, requested the State party, on 19 January 2000, not to carry out the death sentence against Mr. Siragev, while his case was under consideration by the Committee. A further submission from the author (dated 6 December 2000), stated that on an unspecified date, Mr. Siragev's death sentence was commuted.

Factual background

2.1 Danis Siragev was a member of the Uzbek rock band "Al-Vakil". On 26 May 1999, he and another member of the band - Mr. Arutyunyan[2] - were arrested in Moscow following a warrant issued by the Uzbek authorities for the murder and robbery, in April 1998, in Tashkent, of one Laylo Alieva (a pop star), as well as the attempted murder of her son. They were transferred to Tashkent on 3 June 1999.

2.2 By judgement of 3 November 1999, Messrs Siragev and Arutyunyan were found guilty of the murder of Mrs. Alieva and of robbing her jewellery and were sentenced to death. On 20 December 1999, the Supreme Court confirmed the judgement.

The claim

3.1 It is alleged that Mr. Siragev was mistreated and tortured during the investigation to make him confess guilt, to such an extent that he had to be hospitalized. In substantiation of her claim, the author affirms that, in a phone conversation of 15 July 1999, she was informed by the wife of her ex-husband that her son was in the "medical section" of the detention facility, allegedly because he was beaten and suffered broken ribs. Allegedly, the investigation concluded that Mr. Siragev had been beaten by his co-detainees.

3.2 Mr. Siragev's sentence is said to be excessive, as the Tashkent City Court based its judgement on his and Arutyunyan's sole confessions, in the absence of "any witnesses, material proof or fingerprints", and on the depositions of individuals who disappeared shortly after the end of the police investigation, which means that their depositions were not re-confirmed in court. The Supreme Court, allegedly, in a session of 35 minutes, validated these procedural mistakes and violations committed by the investigators and the first instance court.

3.3 It is alleged that Mr. Siragev's "ex officio" counsel was assigned to him only pro forma and the author had no financial means to hire another lawyer. According to the author, this counsel met only "two or three times" with her son, always in the presence of an investigator. In addition, counsel was only allowed to examine the Tashkent City Court's records a few minutes before the beginning of the hearing before the Supreme Court.[3]

State party's observations

4.1 By notes verbales of 13 December 2000, 27 February 2001 and 17 December 2002, the State party was requested to submit to the Committee information on the admissibility and merits of the communication. The Committee notes that such information was only received on 21 October 2005, i.e. during the consideration of the communication by the Committee. The Committee regrets the State party's significant delay in providing information with regard to admissibility and the substance of the author's claims. It recalls that it is implicit in the Optional Protocol that States parties make available to the Committee all information at their disposal, within the time limits set up in rule 97 of the Committee's rules of procedure.

4.2 On 12 October 2005 (note verbale received by fax on 21 October 2005), the State party challenges admissibility and merits of the communication and states, in particular, that the allegations in relation to violations of Mr. Siragev's rights during the preliminary investigation and during the court trial are "groundless".

4.3 The State party recalls that Mr. Siragev was sentenced to death by the Tashkent City Court of 3 November 1999, and that this sentence was upheld, on 20 December 1999, by the Supreme Court of Uzbekistan. He and his co-defendant Mr. Arutyunyan were found guilty of murder and robbery. After a request for a supervisory review by the Chairman of the Supreme Court, the Supreme Court commuted their death sentence to 20 years of deprivation of liberty on 31 March 2000. Moreover, under the provisions of a Presidential Amnesty Decree of 30 April 1999, their prison terms were further reduced by 25 per cent to 15 years.

4.4 According to the State party, Messrs Arutyunyan and Siregev's guilt was confirmed not only on by their confessions, but also by the testimonies of other witnesses, the conclusions of medical-forensic experts, records of the examination of the crime scene, and other evidence of probative value. The State party affirms that Messrs. Arutyunyan and Siragev's acts were qualified correctly (by the courts).

4.5 By another note verbale dated 12 October 2005, the State party re-submits its follow-up reply of 31 December 2004, in case of *Arutyunyan v. Uzbekistan*, communication No. 917/2000 (Annual report A/60/40, Volume II, annex VII), where, in particular, the State party affirmed that (a) it was "groundless to say that investigation of crimes committed by Arutyunyan and Siragev was conducted allegedly through physical or mental pressure on them"; (b) that during the investigation Arutyunyan and Siragev were interrogated with participation of defense lawyers, and they did not complain in court about any illegal treatment against them during investigation.

Issues and proceedings before the Committee

Consideration of admissibility

5.1 Before considering any claim contained in a communication, the Human Rights Committee must, in accordance with rule 93 of its rules of procedure, decide whether or not the communication is admissible under the Optional Protocol to the Covenant.

5.2 The Committee notes that the same matter is not being examined under any other international procedure, in line with the requirements of article 5, paragraph 2 (a), of the Optional Protocol.

5.3 The Committee has noted the alleged violation of Mr. Siragev's rights under articles 14, paragraphs 3 (d), (e), and (g); and 15. No information in substantiation of these claims has been adduced and the author has failed to substantiate these claims, for purposes of admissibility. Accordingly, these claims are inadmissible under article 2 of the Optional Protocol.

5.4 In relation to the claim that the trial of Mr. Siragev was unfair and his sentence excessive, and while regretting the State party's failure to provide any detailed information in this regard, the Committee notes that this claim primarily relates to the assessment of facts and evidence by national tribunals. It recalls that it is in general for the courts of States parties, and not for the Committee, to evaluate the facts and evidence in any particular case, and to interpret domestic legislation, unless the evaluation was arbitrary or amounted to a denial of justice.[4] The author has not advanced any information to this effect, for purposes of admissibility. In the circumstances, the Committee concludes that this claim is inadmissible under article 2 of the Optional Protocol.

5.5 The author has also claimed that while in detention, Mr. Siragev was beaten and tortured by investigators to make him confess, to the point that his ribs were broken and he had to be hospitalized. The State party has merely contended that the allegations that the author's son was subjected to physical or mental pressure were groundless, but it did not challenge the fact that the author's son was beaten and hospitalized. Under these circumstances, the Committee considers the allegations of violations of articles 7 and 10, paragraph 1, sufficiently substantiated for purposes of admissibility. Accordingly, this part of the communication is admissible.

5.6 The author has also claimed that Mr. Siragev was not allowed to meet in private with his designated lawyer during the investigation, and that, later, counsel was prevented from consulting the Tashkent City Court's records in preparation of the cassation appeal to the Supreme Court. The State party did not refute this allegation, but has only affirmed that he was interrogated with the participation of defence lawyer. Accordingly, the Committee considers that this part of the communication is admissible in as far as it appears to raise issues under articles 14, paragraph 3 (b), and 6, of the Covenant.

Consideration of the merits

6.1 The Human Rights Committee has considered the present communication in the light of all the information made available to it by the parties, as provided in article 5, paragraph 1, of the Optional Protocol.

6.2 The author has claimed that her son was beaten in detention and subjected to torture, by investigators, to make him confess guilt, to the extent that he had to be hospitalized. The State party has merely affirmed that this allegation was groundless, without contesting that while in detention, the author's son was mistreated and subsequently hospitalized, and without explaining whether any investigation took place in this relation nor contesting the author's allegation that investigators had affirmed that her son was in fact beaten by his co-detainees. The Committee must, in the circumstances, give due weight to the author's allegations that, while in custody, her son was beaten to the point of requiring hospitalization. It considers that a State party is responsible for the security of any person it deprives of liberty and, where an individual deprived of liberty receives injuries in detention, it is incumbent on the State party to provide a plausible explanation of how these injuries occurred and to produce evidence refuting these allegations. In light of the detailed and uncontested information provided by the author, the Committee concludes that in the present case, the treatment that Mr. Siragev was subjected to amounts to a violation of article 7 of the Covenant, in that the State party has not taken the necessary measures to protect him from serious ill-treatment. In light of this finding in relation to article 7, it is not necessary to separately consider the claims arising under article 10.

6.3 The author alleges that her son's right to properly prepare his defence was violated, because during the preliminary investigation, Mr. Siragev's lawyer was prevented from seeing him confidentially, and because counsel was allowed to examine the Tashkent City Court's records only shortly before the hearing in the Supreme Court. In support of her allegation, she produces a copy of counsel's request for an adjournment, addressed to the Supreme Court on 17 December 1999, which affirms that under different pretexts, counsel had been denied access to the Tashkent City Court's records. This request was dismissed by the Supreme Court, allegedly without any explanation. On appeal, counsel claimed that he was unable to meet privately with his client to prepare his defence; the Supreme Court allegedly failed to address this issue as well The State party has not challenged this, it has only merely affirmed that Mr. Siragev was represented by a lawyer during preliminary investigation. In the absence of any other observations from the State party on this claim, the Committee considers that article 14, paragraph 3 (b), has been violated in the instant case.

6.4 The Committee recalls that the imposition of a death sentence upon conclusion of a trial in which the provisions of the Covenant have not been respected, constitutes a violation of article 6 of the Covenant, if no further appeal against the death sentence is possible.[5] In Mr. Siragevs's case, the final death sentence was pronounced without the requirements for a fair trial set out in article 14 having been met. This results in the conclusion that the right protected under article 6 has also been violated.

7. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the Covenant, is of the view that the facts before it disclose a violation of articles 7 and 14, paragraph 3 (b), read together with article 6 of the Covenant.

8. In accordance with article 2, paragraph 3 (a), of the Covenant, the State party is under an obligation to provide Mr. Siragev with an effective remedy. The Committee notes that violation of article 6 was rectified by the commutation of Mr. Siragev's death sentence. The remedy could include consideration of a further reduction of his sentence and compensation. The State party is also under an obligation to prevent similar violations in the future.

9. Bearing in mind that, by becoming a party to the Optional Protocol, the State party has recognized the competence of the Committee to determine whether there has been a violation of the Covenant or not and that, pursuant to article 2 of the Covenant, the State party has

undertaken to ensure to all individuals within its territory or subject to its jurisdiction the rights recognized in the Covenant and to provide an effective and enforceable remedy in case a violation has been established, the Committee wishes to receive from the State party, within 90 days, information about the measures taken to give effect to the Committee's Views. The State party is also requested to publish the Committee's Views.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the Committee's annual report to the General Assembly.]

Notes

[1] The Covenant and the Optional Protocol entered into force for the State party on 28 December 1995.

[2] Mr. Arutyunyan's case was examined by the Committee. See communication No. 917/2000, *Arsen Arutyunyan v. Uzbekistan*, Views adopted on 29 March 2004 (violations of articles 14, paras. 3 (d) and 6.

[3] The case file contains a request for adjournment by Mr. Siragev's lawyer, dated 17 December 1999, where the lawyer requests the Supreme Court to adjourn the session as he was unable to compare the court records ("protocol") of the trial before the Tashkent City Court with his own notes in order to insure their exactitude. The Supreme Court allegedly had ignored his request.

[4] See for example communication No. 541/1993, *Errol Simms v. Jamaica*, Inadmissibility decision of 3 April 1995, para. 6.2.

[5] See, for example, communication No. 775/1997, *Brown v. Jamaica*, Views adopted on 23 March 1999, para. 6.15.

E. Communication No. 913/2000, *Chan v. Guyana*
(Views adopted on 31 October 2005, eighty-fifth session)[*]

Submitted by:	Lawrence Chan (not represented by counsel)
Alleged victim:	The author
State party:	Guyana[1]
Date of communication:	15 September 1998 (initial submission)
Subject matter:	Mandatory imposition of the death penalty after unfair trial
Substantive issues:	Arbitrary deprivation of life - Right to adequate time and facilities for the preparation of one's defence - Right to free legal assistance
Procedural issues:	State party's failure to cooperate - Failure to substantiate claims
Articles of the Covenant:	6 and 14, paragraph 3 (b) and (d)
Articles of the Optional Protocol:	2 and 4, paragraph 2

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 31 October 2005,

Having concluded its consideration of communication No. 913/2000, submitted to the Human Rights Committee by Lawrence Chan under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the author of the communication, and the State party,

Adopts the following:

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[*] The following members of the Committee participated in the examination of the present communication: Mr. Nisuke Ando, Mr. Prafullachandra Natwarlal Bhagwati, Mr. Alfredo Castillero Hoyos, Mr. Maurice Glèlè Ahanhanzo, Mr. Edwin Johnson, Mr. Walter Kälin, Mr. Ahmed Tawfik Khalil, Mr. Michael O'Flaherty, Ms. Elisabeth Palm, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Ivan Shearer, Mr. Hipólito Solari-Yrigoyen, Ms. Ruth Wedgwood and Mr. Roman Wieruszewski.

The text of two individual opinions, one co-signed by Committee members Mr. Ivan Shearer and Mr. Prafullachandra Natwarlal Bhagwati, the other by Ms. Ruth Wedgwood, are appended to the present document.

Views under article 5, paragraph 4, of the Optional Protocol

1.1 The author is Lawrence Chan, a national of Guyana, currently detained in Georgetown Prisons and awaiting execution. Although he does not invoke any specific provisions of the International Covenant on Civil and Political Rights, the communication appears to raise issues under articles 6 and 14 of the Covenant. The author is not represented by counsel.

1.2 In accordance with rule 92 (former rule 86) of the Committee's rules of procedure, the Committee, through its Special Rapporteur on new communications, requested the State party on 7 February 2000 not to carry out the death sentence against the author, to make it possible for the Committee to examine the communication.

Factual background

2.1 During the night of 11 January 1993, one Raphael Seecharran (R.S.), a trader, and his assistant, Ramong, were killed at a camp on the Kaituma River, in the presence of one J.K., who accompanied the two men on their journey. Also present were the author, who was armed with a gun, the author's brother, J.C., and the brother's friend, G.R. R.S. reportedly carried 25,000 Guyana dollars on him at the time of his death.

2.2 J.K. managed to escape and reported the incident to the police. The author was subsequently arrested and identified by J.K. at an I.D. parade on 15 March 1993. He was charged with murder and committed for trial together with his brother, J.C., who had surrendered himself to the police, and G.R. It is unclear whether the author was assisted by a lawyer during the preliminary inquiry.

2.3 During the preliminary inquiry, a statement incriminating the author allegedly made by J.C. was tendered in evidence and formed part of the proceedings. Upon receipt of the depositions after committal, the prosecution entered a *nolle prosequi* in favour of J.C., who was freed and later summoned to testify for the prosecution. G.R. died in prison.

2.4 On 21 November 1993, the bones and skulls of the deceased were found in a creek together with their clothes and a wristwatch that R.S. had worn at the time of his death.

2.5 At the beginning of the trial on 23 November 1995, the author stated that he was not in a position to retain counsel and was assigned a legal aid lawyer who, in his absence, was represented by another lawyer. After the author had pleaded not guilty and the jury had been sworn in, the trial was adjourned until Monday, 27 November 1995, at the request of the representative of the author's lawyer, who was "engaged in the Court of Appeal today and tomorrow".

2.6 During the trial, J.C. withdrew his claim that the police had beaten him to extract a statement incriminating the author and stated that the author had told him to make this allegation. He also denied that he and G.R. had made up a story against the accused because they were lovers, or that he had surrendered himself to the police to have his sister released from police custody.

2.7 By judgement of 20 December 1995, a jury of the High Court of the Supreme Court of Judicature of Guyana found the author guilty of murder. The Court based the author's conviction, inter alia, on the testimonies of J.K., J.C., J. Clementson (a cousin of R.S.), L.M. (the medical practitioner who had performed the post mortem examination of the deceased), L.T. (a ballistic expert), O.S. (a former police corporal), and several other police officers.

2.8 Pursuant to Section 101 of the Criminal Law (Offences) Act, which provides that "Everyone who commits murder shall be guilty of felony and liable to suffer death as a felon", the Court automatically imposed the death sentence on the author.

2.9 On 3 January 1996, the author appealed his conviction and sentence to the Court of Appeal of the Supreme Court of Judicature of Guyana on the ground that he did not have a fair trial. In particular, the author claimed (a) that the trial judge had shown a bias when constantly filling the gaps for the prosecution's case by questioning the witnesses, which had resulted in an unbalanced approach of the case for the defence in his summing-up, and (b) that the judge had erred in allowing additional evidence from J. Clementson, J.C., L.T. and O.S., in the absence of any good reason for not having taken such evidence during the preliminary inquiry.

2.10 On 13 June 1997, the Court of Appeal of the Supreme Court, by two votes to one, dismissed the author's appeal and confirmed his conviction and sentence. The Court held that the trial judge had duly exercised his discretion throughout the trial.

The complaint

3.1 The author claims that he was severely beaten to confess the crime, as were his brother and G.R., both of whom signed a statement as a result. All of them were denied medical treatment, although they could not eat or walk properly. The police simply waited until they felt better to bring them before a judge, who took no action on their complaints about their ill-treatment.

3.2 The author also claims that the prosecution made a deal with J.C. and G.R., by which they testified against him. The charges against them were dropped in exchange. His death sentence was thus based on the false testimony of his brother.

3.3 The author emphasizes that, as a member of a poor Amerindian family, he did not have sufficient means to pay for a lawyer. He therefore had to rely on the assistance of a State-appointed lawyer throughout his trial. Ultimately, the injustice done to him was a result of his poverty.

Failure of the State party to cooperate

4. On 13 August and 11 October 2001, the State party was requested to submit to the Committee information on the admissibility and merits of the communication. The Committee notes that this information has not been received. The Committee regrets the State party's failure to provide any information with regard to admissibility or the substance of the author's claims. It recalls that it is implicit in article 4, paragraph 2, of the Optional Protocol that States parties examine in good faith all the allegations brought against them, and that they make

available to the Committee all information at their disposal. In the absence of a reply from the State party, due weight must be given to the author's allegations, to the extent that these have been properly substantiated.

Issues and proceedings before the Committee

Consideration of admissibility

5.1 Before considering any claim contained in a communication, the Human Rights Committee must, in accordance with article 93 of its rules of procedure, decide whether or not it is admissible under the Optional Protocol to the Covenant.

5.2 The Committee has ascertained that the same matter is not being examined under another procedure of international investigation or settlement for purposes of article 5, paragraph 2 (a), of the Optional Protocol and that the author has exhausted all available domestic remedies,[2] in accordance with article 5, paragraph 2 (b), of the Optional Protocol.

5.3 As to the author's allegation that the police had beaten him and his brother, as well as G.R., thereby extracting incriminating statements against him from J.C. and G.R., the Committee notes the inconsistencies in the testimony given by J.C. on this issue at the jury trial. It further notes the author's claim that part of the evidence against him had been obtained as a result of a deal between the prosecution and his brother. However, in the absence of any evidence which would corroborate these allegations, the Committee considers that the author has not sufficiently substantiated these claims for purposes of admissibility. It follows that this part of the communication is inadmissible under article 2 of the Optional Protocol.

5.4 With regard to the author's legal representation, the Committee recalls that, on the first day of the trial, the representative of the author's State-appointed lawyer requested an adjournment of the trial for only two week days, during which the lawyer was engaged in the Court of Appeal. It considers that the short time available for the preparation of the author's defence raises issues under article 14, paragraph 3 (b) and (d), of the Covenant. Moreover, the Committee considers that the mandatory imposition of the death sentence on the author raises issues under articles 6 and 14 of the Covenant. In the absence of any observations by the State party on the admissibility of the communication, the Committee declares the communication admissible, insofar as it raises issues under articles 6 and 14 of the Covenant.

Consideration of the merits

6.1 The Human Rights Committee has considered the present communication in the light of all the information made available to it, as provided under article 5, paragraph 1, of the Optional Protocol.

6.2 As regards the time available for the preparation of the author's defence, the Committee recalls that the author's right under article 14, paragraph 3 (d), to have legal assistance assigned to him entitled him to effective legal representation,[3] including adequate time and facilities for the preparation of his defence, as guaranteed in article 14, paragraph 3 (b). While noting that the trial was adjourned for only two week days at the request of the author's counsel, the Committee recalls that counsel was assigned to the author by the State party. It further recalls that the conduct of a defence lawyer may be attributed to a State party, if it was manifest to the judge that such conduct was incompatible with the interests of justice.[4]

6.3 The Committee considers that in a capital case, where the defence lawyer is absent on the first day of the trial, when he is being appointed as legal aid counsel for the accused and, through his representative, requests adjournment of the trial, the Court must ensure that such adjournment provides the accused with sufficient time to prepare his defence together with his lawyer. It should have been manifest to the judge in a capital case that counsel's request for an adjournment of the trial for only two week days, during which he was engaged in another case, was not compatible with the interests of justice, since it did not provide the author with adequate time and facilities to prepare his defence. In the light of this and in the absence of an explanation by the State party, the Committee concludes that the author was not effectively represented at trial, in violation of article 14, paragraph 3 (b) and (d), of the Covenant.

6.4 With regard to the author's sentence, the Committee recalls its jurisprudence that the imposition of a sentence of death upon conclusion of a trial in which the provisions of the Covenant have not been respected constitutes a violation of article 6 of the Covenant.[5] It also recalls that the author was not effectively represented at trial, in violation of article 14, paragraph 3 (b) and (d). The Committee concludes that the sentence of death was passed on the author without meeting the guarantees set out in article 14 of the Covenant, and thus also in breach of article 6, read in conjunction with article 14.

6.5 Furthermore, the Committee notes that the death sentence was passed automatically by the trial court, once the jury had rendered its verdict that the author was guilty of murder, in application of Section 101 of the Criminal Law (Offences) Act. This provision requires that "Everyone who commits murder shall be guilty of felony and liable to suffer death as a felon", without regard being able to be paid to the defendant's personal circumstances or the circumstances of the particular offence. The Committee refers to its jurisprudence that the automatic and mandatory imposition of the death penalty constitutes an arbitrary deprivation of life, in violation of article 6, paragraph 1, of the Covenant, in circumstances where the death penalty is imposed without regard being able to be paid to the defendant's personal circumstances or the circumstances of the particular offence.[6] It follows that the automatic imposition of the death penalty on the author violated his rights under article 6, paragraph 1.

7. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts before it reveal violations by the State party of article 14, paragraph 3 (b) and (d), and of article 6, read alone and in conjunction with article 14, of the Covenant.

8. In accordance with article 2, paragraph 3, of the Covenant, the State party is under an obligation to provide the author with an effective remedy, including commutation of his death sentence. The State party is also under an obligation to take measures to prevent similar violations in the future.

9. Bearing in mind that, by becoming a party to the Optional Protocol, the State party has recognized the competence of the Committee to determine whether there has been a violation of the Covenant or not and that, pursuant to article 2 of the Covenant, that State party has undertaken to ensure all individuals within its territory or subject to its jurisdiction the rights

recognized in the Covenant and to provide an effective and enforceable remedy in case a violation has been established, the Committee wishes to receive from the State party, within 90 days, information about the measures taken to give effect to the Committee's Views. The State party is also requested to publish the Committee's Views.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the Committee's annual report to the General Assembly.]

Notes

[1] The Covenant and the Optional Protocol entered into force for the State party respectively on 15 May 1977 and 10 August 1993. Upon ratification of the Covenant, the State party entered the following reservation in respect of subparagraph (d) of paragraph 3 of article 14: "While the Government of the Republic of Guyana accept the principle of Legal Aid in all appropriate criminal proceedings, is working towards that end and at present apply it in certain defined cases, the problems of implementation of a comprehensive Legal Aid Scheme are such that full application cannot be guaranteed at this time." On 5 January 1999, the State party notified the Secretary-General that it had decided to denounce the Optional Protocol with effect from 5 April 1999, that is, subsequent to the initial submission of the communication. On the same date, the State party re-acceded to the Optional Protocol with the following reservation: "[...] Guyana re-accedes to the Optional Protocol to the International Covenant on Civil and Political Rights with a Reservation to article 6 thereof with the result that the Human Rights Committee shall not be competent to receive and consider communications from any person who is under sentence of death for the offences of murder and treason in respect of any matter relating to his prosecution, detention, trial, conviction, sentence or execution of the death sentence and any matter connected therewith.

Accepting the principle that States cannot generally use the Optional Protocol as a vehicle to enter reservations to the International Covenant on Civil and Political Rights itself, the Government of Guyana stresses that its Reservation to the Optional Protocol in no way detracts from its obligations and engagements under the Covenant, including its undertaking to respect and ensure to all individuals within the territory of Guyana and subject to its jurisdiction the rights recognized in the Covenant (in so far as not already reserved against) as set out in article 2 thereof, as well as its undertaking to report to the Human Rights Committee under the monitoring mechanism established by article 40 thereof."

[2] Guyana does not recognize the jurisdiction of the Judicial Committee of the Privy Council as the final instance of appeal.

[3] Communication No. 594/1987, *Phillip v. Trinidad and Tobago*, Views adopted on 20 October 1998, at para. 5.10.

[4] Cf. communication No. 618/1995, *Campbell v. Jamaica*, Views adopted on 20 October 1998, at para. 7.3.

[5] See, for example, communication No. 838/1998, *Oral Hendricks v. Guyana*, Views adopted on 28 October 2002; communication No. 912/2000, *Deolall, v. Guyana*, Views adopted on 1 November 2004; communication No. 867/1999, *Smartt v. Guyana*, Views adopted on 6 July 2004.

[6] See communication No. 806/1998, *Thompson v. St. Vincent and The Grenadines*, Views adopted on 18 October 2000; communication No. 845/1998, *Kennedy v. Trinidad and Tobago*, Views adopted on 26 March 2002; communication No. 1077/2002, *Carpo et al. v. Philippines*, Views adopted on 28 March 2003; communication No. 1167/2003, *Ramil Rayos v. Philippines*, Views adopted on 27 July 2004.

APPENDIX

Individual opinion by Committee members Messrs. Ivan Shearer and Prafullachandra Natwarlal Bhagwati

We agree with the Views of the Committee in finding a violation of article 6 in this case, confirming its consistent jurisprudence that the automatic and mandatory imposition of the death penalty, without regard to the personal circumstances of the convicted person or the circumstances of the particular offence, is contrary to the Covenant.

However, we find ourselves unable to join in the finding of additional violations of article 14, paragraphs 3 (b) and (d) regarding the fairness of Mr. Chan's trial. Mr Chan's trial opened on Thursday 23 November 1995. He stated that he was unable to retain counsel. The court then assigned a legal aid lawyer. The trial was deferred until Monday 27 November. The assigned lawyer was said to have been engaged in a case before the Court of Appeal on 23 and 24 November. However, even if that case engaged the lawyer's full attention on those two weekdays there still remained the weekend during which the lawyer could take instructions and prepare for the author's trial.

We note that the author himself does not allege as part of his complaint that his lawyer was granted insufficient time to prepare. His complaint was that he was unable to retain counsel of his own choice as a result of poverty. Nor is there any evidence before the Committee that the lawyer asked the court to allow further time for preparation. Notwithstanding the special care that should be exercised in securing a fair trial for an offence carrying the death penalty, in the circumstances of the present case there seem to us insufficient grounds for finding a violation of article 14.

(*Signed*): Ivan Shearer

(*Signed*): Prafullachandra Natwarlal Bhagwati

[Done in English, French and Spanish, the English text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the Committee's annual report to the General Assembly.]

Individual opinion by Committee member Ms. Ruth Wedgwood

The Human Rights Committee has assumed in this matter that it is the date of an author's initial submission of a communication, rather than the date of its formal registration and transmission to the State party for reply, that is the decisive date for judging admissibility *ratione temporis*. Guyana denounced the Optional Protocol to the Covenant on 5 January 1999, with the denunciation taking effect as of 5 April 1999. Guyana re-acceded to the Optional Protocol on the same date, with a reservation concerning capital cases. The initial communication by the author to the Committee was submitted on 15 September 1998, and the State party was asked for a reply on 7 February 2000.

Our prior practice has varied. *See Thomas v. Jamaica,* No. 800/1998, at paragraph 6.3, *noted in* Manfred Nowak, United Nations Covenant on Civil and Political Rights, CCPR Commentary, 2nd revised edition 2005, at p. 907. *But see Smartt v. Guyana,* No. 867/1999, at para. 1.2; *Deolall v. Guyana*, No. 912/2000, at para. 4.5; *Siewpersaud v. Trinidad and Tobago*, No. 938/2000, at para. 9 (transmitted to State party 1 August 2000). Though this is a debatable conclusion, within reasonable limits, I am willing to accept the Committee's view.

On the merits of this case, I join with my colleagues Ivan Shearer and Prafullachandra Natwarlal Bhagwati in concluding that there is no established violation of article 14 (3) (b), concerning the adequacy of preparation time for appointed legal counsel. Though, in a capital case, a period of four calendar days for counsel to prepare for trial is far from ideal, the defense attorney did not request any further delay. The committee is not in a position to second-guess the judgement of the defense counsel and the trial judge that this delay sufficed for adequate preparation.

On the issue of the capital sentence imposed on the author, article 6 (2) of the Covenant specifies that the death penalty may be imposed "only for the most serious crimes". The law of Guyana extends a mandatory death penalty to all cases of murder, whether or not the crime involved additional aggravating circumstances. It forbids the court or jury to consider any mitigating information concerning the defendant or the particular circumstances of the crime. Nor is it clear that the mandatory penalty is even limited to cases of intentional killing or wanton disregard for human life, as opposed to felony murder. In these circumstances, absent any clarification by the State party, application of the statute in this case would not appear to be consistent with the requirements of article 6 (2).

Consideration of the death penalty in Guyana may be importantly influenced in the future by the jurisprudence of the new Caribbean Court of Justice. But for the moment, the Committee is bound to measure State practice *tout simple* against the standards of the Covenant and the information provided by the parties to the Optional Protocol.

(*Signed*): Ruth Wedgwood

[Done in English, French and Spanish, the English text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the Committee's annual report to the General Assembly.]

F. Communication No. 915/2000, *Ruzmetov v. Uzbekistan*
(Views adopted on 30 March 2006, eighty-sixth session)*

Submitted by:	Mrs. Darmon Sultanova (represented by counsel)
Alleged victims:	The author, the author's deceased sons, Mr. Uigun and Oibek Ruzmetov, and author's husband, Mr. Sobir Ruzmetov
State party:	Uzbekistan
Date of communication:	7 February 2000 (initial submission)
Subject matter:	Death sentence after unfair trial, torture, unavailability of habeas corpus, inhuman treatment in custody, violation of the right to privacy
Substantive issues:	Right to life, torture, degrading treatment or punishment, arbitrary detention, right to be brought promptly before a judge/officer authorized by law to exercise judicial power, right to communicate with counsel, right to examine witnesses, interim measures to avoid irreparable damage to the alleged victim, violation of obligations under the Optional Protocol, unlawful interference with one's privacy
Procedural issues:	-
Articles of the Covenant:	2, paragraph 3; 6; 7; 9; 10, paragraph 1; 14, paragraphs 1, 2, 3 (b), (d), (e), and (g); and 17
Articles of the Optional Protocol:	1, 2 and 5, paragraphs 2 (a) and (b)

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 30 March 2006,

Having concluded its consideration of communication No. 915/2000, submitted to the Human Rights Committee by Mrs. Darmon Sultanova under the Optional Protocol to the International Covenant on Civil and Political Rights,

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* The following members of the Committee participated in the examination of the present communication: Mr. Nisuke Ando, Mr. Prafullachandra Natwarlal Bhagwati, Ms. Christine Chanet, Mr. Maurice Glèlè Ahanhanzo, Mr. Edwin Johnson, Mr. Walter Kälin, Mr. Ahmed Tawfik Khalil, Mr. Rajsoomer Lallah, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Ivan Shearer, Mr. Hipólito Solari-Yrigoyen and Mr. Roman Wieruszewski.

Having taken into account all written information made available to it by the author of the communication, and the State party,

Adopts the following:

Views under article 5, paragraph 4, of the Optional Protocol

1.1 The author of the communication is Darmon Sultanova, an Uzbek national born in 1945. She submits the communication on her own behalf, on behalf of her sons, Uigun and Oibek Ruzmetov, also Uzbek nationals, born in 1970 and 1965 respectively. Her sons were sentenced to death by the Tashkent Regional Court on 24 July 1999 (Uigun) and 29 July 1999 (Oibek).The sentences were upheld on appeal by the Supreme Court of the Republic of Uzbekistan on 20 September 1999. The whereabouts of her sons was unknown at the time of submission of the communication. Mrs. Sultanova also acts on behalf of her husband, Sobir Ruzmetov, an Uzbek national born in 1935, who at the time of submission of the communication was serving a five-year prison term in colony UYA 64/61 in Karshi, Surkhandarya region, pursuant to a judgement handed down by the Khazorasp District Court on 28 May 1999 and upheld on appeal on 2 November 1999 (title of the court not provided). Mrs. Sultanova claims that she is a victim of violations by Uzbekistan of article 9, and in light of her sons' execution, of article 7 of the International Covenant on Civil and Political Rights.[1] She further claims that her sons are the victims of violations by Uzbekistan of articles 7, 9, 14, paragraphs 1, 2, 3 (b), (d), (e) and (g), and in light of their execution, of article 6. She also claims that her husband is a victim of violations of articles 9, 10, paragraph 1, and 14, paragraphs 1, 2, 3 (b), (d), (e) and (g). The author is represented by counsel.

1.2 On 22 February 2000, in accordance with rule 92 (old rule 86) of its rules of procedure, the Human Rights Committee, acting through its Special Rapporteur on new communications, requested the State party not to carry out the death sentence against Uigun and Oibek Ruzmetov, pending the determination of their case by the Committee. This request for interim measures for protection was reiterated on 17 December 2002. No reply was received from the State party.

1.3 By letter of 14 October 2003, the author informed the Committee that after several inquiries about the whereabouts of her sons to the authorities, she was informed, by letter of the Tashkent Regional Court dated 13 June 2000, that Uigun and Oibek Ruzmetov had been executed on 29 September 1999 (i.e. prior to the receipt of the communication by the Committee).[2] She indicates, however, that information provided by the Tashkent Regional Court contradicts information which she received on an unspecified date from the Yunusabad District Bureau of the Civilian Registry Office (ZAGS), an agency responsible for maintaining records of the death of individuals, confirming that no official record about the death of Uigun and Oibek Ruzmetov had been received in 1999-2000.

Factual background

2.1 At midnight on 28 December 1998, five officers of the Khazorasp prosecutor's office and District Department of Internal Affairs, accompanied by several militiamen, broke into the author's house in Khazorasp. They conducted a thorough search, without any warrant, in the presence of two witnesses. In response to the author's request to be served a search warrant, an officer of the Department of Internal Affairs began questioning her about religious beliefs and the whereabouts of her sons, who were in Pitnak, around 20 km from Khazorasp. A protocol certifying that the search had produced no results was drawn up in two copies, one of which was given to the author. Six militiamen remained as guards. At 5 a.m. on 29 December 1998, one Mr. Bozbekov entered a room in the house and placed three bullets into a jar. At midnight on 30 December 1998, militiamen armed with machine guns entered the author's house with a prosecutor and a Chief of the militia, and conducted another search, this time with a warrant. The three bullets in the empty jar, banned religious literature and a packet of drugs were found this time. A protocol was drawn up but no copy was given to the author, despite repeated requests. According to the author, subsequent charges against her sons and husband were partly based on what was found during the second search. A number of personal belongings were taken from the house during the searches. According to the author, seven militiamen lived in her house from 28 December 1998 to 6 February 1999. Throughout this period, all family members were threatened with being shot, and they were at all times accompanied by a militiaman. No family member was allowed to leave the house or to make phone calls.

2.2 Uigun and Oibek Ruzmetov were arrested on 1 January 1999, and their father, Sobir Ruzmetov was arrested on 2 January 1999 in their apartment in Pitnak, on the basis of the warrants issued by the Prosecutor of Khozarasp. Uigun and Oibek Ruzmetov's charges included: (a) attempt to overthrow the government, (b) forcefully to change the constitutional regime, (c) to establish an Islamic fundamentalist regime, (d) to organize a "jihad" movement, and (e) murder under aggravating circumstances. Sobir Ruzmetov was charged with illegal possession of weapons and drugs without intent to sell. According to the author, while in detention in the basement of Urgench Office of the Department of Internal Affairs, her sons were subjected to torture by militia officers, with a view to obtaining self-incriminating "confessions". Allegedly, they were punched; beaten with truncheons; kicked; raped; hung up with their hands tied at the back; forcefully dropped on a cement floor; threatened with rape of their wives and with arrest of their parents.

2.3 At 7 p.m. on 5 January 1999, Mrs. Sultanova was allegedly ordered to bring all her clothes and food from the house in order to visit her husband, Sobir Ruzmetov, in a prison in Urgench. She was brought to the Chief of Urgench National Security Service, who insulted her. She then was brought to the basement of Urgench Office of the Department of Internal Affairs, handcuffed and placed in solitary confinement. Her clothes were removed, and she was thus exposed by the National Security Service's Chief to 2-3 young men, among them one of her sons. She allegedly hardly recognized Uigun, whose body was covered with bruises and showed visible marks of torture.

2.4 Early on 6 February 1999, seven militiamen entered the author's house and caused considerable damage to her property. The author submitted close to 100 complaints, requesting an investigation. They were addressed to the Khazorasp prosecutor, the Regional Prosecutor's Office, the President of Uzbekistan, the Minister of Internal Affairs and the President of the Supreme Court. According to the author, none of the above initiated an investigation.

2.5 The author contends that she was not informed of the date of her sons' trial. As a result, she could not hire an independent lawyer to defend them during the trial, and they were represented by an *ex officio defence attorney*. Having learned by accident on 12 June 1999 that the trial of her sons, along with that of six other co-defendants, was in process in Tashkent Regional Court, she was allowed into the court room on 12, 13 and 14 June 1999. Thereafter, she allegedly was refused access. The author claims that the trial of her sons was largely held in camera, and that none of the witnesses, not even witnesses for the prosecution, were present in the court room despite numerous requests to this effect by all co-defendants. The author adds that the presiding judge acted in an accusatory manner.

2.6 During the hearing on 13 July 1999, Uigun and Oibek Ruzmetov testified that they were forced to confess and described the torture they had been subjected to. Uigun stated that a pistol, 12 bullets and drugs were placed into his pocket and that he signed a form confessing his "guilt" only after being shown his naked mother and after being told that his wife would be raped unless he signed the form. They also asserted that they were interrogated in the basement of the National Security Service Office in Tashkent in the absence of a lawyer and were subjected to torture. Oibek Ruzmetov was allegedly unable to walk without help after the interrogation. Uigun and Oibek also testified that they did not have access to a lawyer of their choosing during the investigation. Allegedly, the court disregarded all the testimonies and admitted the evidence obtained through torture and in the absence of a counsel of the author's sons' choosing.

2.7 On 24 July 1999, the Tashkent Regional Court sentenced five out of eight co-defendants, including Uigun and Oibek Ruzmetov, to death. The court concluded that Oibek Ruzmetov had created an armed group in 1995, with intent to commit robbery and to collect money for the purchase of weapons and the establishment of an Islamic regime based on the "Wahhabi" ideology. It further found that Oibek Ruzmetov and other members of the group, including Uigun Ruzmetov, established a centre in Burchmullo, Tashkent region, with the intent to blow up a water reservoir. The court found Uigun Ruzmetov guilty of a violation of many provisions of the Criminal Code, including illegal organization of public unions or religious organizations; smuggling; illegal possession of weapons, cartridges, explosive materials or explosive assemblies; premeditated murder; and production or distribution of materials threatening public security and public order. Mr. Oibek Ruzmetov was found guilty of a violation of similar provisions of the Criminal Code, as well as of an attempt against the constitutional order of the Republic of Uzbekistan and sabotage. On appeal, the Supreme Court upheld the death sentence on 20 September 1999. An appeal for review submitted to the Ministry of Justice was refused on 7 October 1999. The author submits that the appeals for pardon were submitted to the Presidential Office on 20 March and 5 September 2000, respectively.

2.8 On 24 July 1999, in alleged violation of article 137 of the Uzbek Code of Criminal Procedure, relatives of Uigun and Oibek Ruzmetov, including the author, were not allowed to meet them nor to deliver letters. The author claims that while her sons were in custody, she could meet them only twice, on 1 August and 23 September 1999. Their lawyer, hired by the author, was twice refused access to them in custody after the pronouncement of the death sentence.

2.9 The author's husband was sentenced to five years' imprisonment by the Khazorasp Regional Court on 28 May 1999. The author claims that her husband was also subjected to torture in custody, as a result of which he had to be brought to court on a stretcher on 28 May 1999. The author contends that she could not attend her husband's trial that lasted for only two hours; that her husband was not assisted by a lawyer during the hearing and was not given an opportunity to question witnesses or to examine evidence in court. For the author, the evidence against her husband was fabricated. Allegedly, Sobir Ruzmetov was not eligible for amnesty after pronouncement of his sentence because his conduct allegedly violated prison regulations.

2.10 According to the author, regular searches, interrogations and harassment of herself and her family by officers of Khazorasp District Department of Internal Affairs continued throughout 2000 and 2001. On 1 April 2001 the author, her handicapped daughter and three grandchildren relocated to her other apartment in Pitnak, where they were subsequently harassed by officers of the Pitnak Department of Internal Affairs. On 4 April 2001, the Chief of the Pitnak Department of Internal Affairs insulted the author, ordered her to remove her headscarf and threatened to put her in prison.

The complaint

3.1 The author claims that her deprivation of liberty by persons acting in an official capacity between 28 December 1998 and 6 February 1999 without charges, and the subsequent failure of the State party to investigate these acts, constitutes a violation of article 9 of the Covenant. These facts would also appear to raise issues under articles 7 and 17, although these provisions were not invoked by the author.

3.2 The author contends that she is a victim of a violation of article 7, in relation to the execution of her sons of which she was only informed after the event.

3.3 The author claims that the charges against her sons were fabricated, and that her sons' arrest on the basis of warrants issued by the prosecutor, their detention for seven months without any judicial review, as well as their treatment in custody and during the trial give rise to violations of articles 6, 7, 9, 14, paragraphs 1, 2, 3 (b), (d), (e) and (g).

3.4 The author claims that the charges against her husband were also fabricated, and that her husband's arrest and the treatment he was subjected to in custody and trial amount to violations of articles 9, 10, paragraph 1, and 14, paragraphs 1, 2, 3 (b), (d), (e) and (g).

3.5 Finally, the author claims that the State party executed her sons in spite of a request for interim measures of protection addressed to the State party on behalf of the Committee. She contends that the State party forged official death records, so that the date of execution of her sons would appear to pre-date registration of the communication and the request for interim measures. In this regard she points to the discrepancy between the records of the Tashkent Regional Court and the records of the Yunusabad District Bureau of the Civilian Registry Office (ZAGS) (see paras. 1.3 and 2.9 above). She notes that a letter of the Tashkent Regional Court was sent to her almost 10 months after the date of the alleged execution, but after the request for interim measures of protection had been addressed to the State party. This is said to constitute a breach of the State party's obligations under the Optional Protocol.

State party's observations on admissibility and merits

4. By notes verbales of 22 February 2000, 20 February and 25 July 2001, and 17 December 2002, the State party was requested to submit to the Committee information

on the admissibility and merits of the communication. On 19 December 2003, the State party submitted that Uigun and Oibek Ruzmetov had been tried and found guilty by the Tashkent Regional Court on 29 June 1999 of a variety of crimes under the Criminal Code of Uzbekistan. Both were sentenced to death, and their sentences were upheld by decision of the Supreme Court on 20 September 1999. The State party provides a list of all the criminal acts that Uigun and Oibek Ruzmetov were found guilty of. It submits that the court correctly qualified their acts, and imposed the proper sentences by taking into account the "public danger" of their crimes.

Issues and proceedings before the Committee

Alleged breach of the Optional Protocol

5.1 The Committee has noted the author's allegation that the State party violated its obligations under the Optional Protocol by executing her sons, in spite of the fact that a communication was sent to the Committee and a request for the interim measures had been issued on 22 February 2000. No reply has been received from the State party on the request for interim measures, and no explanations were provided in relation to the allegation (see paragraph 3.5) that the author's sons were executed after the registration of the communication by the Committee, and after a request for interim measures was issued to the State party. The author has contended that the State party had forged its death records, so that the date of execution of her sons would pre-date the registration of the communication and the interim measures request.

5.2 The Committee recalls[3] that by adhering to the Optional Protocol, a State party to the Covenant recognizes the competence of the Committee to receive and consider communications from individuals claiming to be victims of violations of any of the rights set forth in the Covenant (Preamble and article 1). Implicit in a State's adherence to the Protocol is an undertaking to cooperate with the Committee in good faith so as to permit and enable it to consider such communications, and after examination to forward its views to the State party and to the individual (article 5, paragraphs 1 and 4). The Committee further recalls that interim measures pursuant to rule 92 of the Committee's rules of procedure are essential to the Committee's role under the Protocol. Flouting of the rule, especially by irreversible measures such as the execution of the alleged victims, undermines the protection of Covenant rights through the Optional Protocol.[4]

5.3 In its previous case law, the Committee had addressed the issue of a State party acting in breach of its obligations under the Optional Protocol by executing a person on whose behalf a communication was submitted to the Committee, not only from the perspective whether the Committee had explicitly requested interim measures of protection, but also on the basis of the irreversible nature of capital punishment. In view of the State party's failure to cooperate with the Committee in good faith on the issue of interim measures in spite of the reiterated request, and in the absence of any response to the allegation that the author's sons were executed after the registration of the communication by the Committee, and after a request for interim measures was issued to the State party, the Committee considers that the facts as submitted by the author disclose a breach of the Optional Protocol.

Consideration of admissibility

6.1 Before considering any claim contained in a communication, the Human Rights Committee must, in accordance with rule 93 of its rules of procedure, decide whether or not the case is admissible under the Optional Protocol to the Covenant.

6.2 The Committee begins by noting that the author has not provided any proof that she is authorized to act on behalf of her husband, despite the fact that by the time of consideration of the communication by the Committee he should have already served his sentence. Neither has she substantiated why it was impossible for the victim to submit a communication on his own behalf. In the circumstances of the case and in the absence of a power of attorney or other documented proof that the author is authorized to act on his behalf, the Committee must conclude that as far as it relates to her husband, the author has no standing under article 1 of the Optional Protocol.[5]

6.3 The Committee has ascertained, as required under article 5, paragraph 2 (a), of the Optional Protocol, that the same matter is not being examined under another procedure of international investigation or settlement. Concerning the exhaustion of domestic remedies, the Committee has noted that according to the information submitted by the author, all available domestic remedies have been exhausted. In the absence of any pertinent information from the State party, the Committee considers that the requirements of article 5, paragraph 2 (b), of the Optional Protocol have been met with regard to the author and the author's sons.

6.4 The Committee considers that there is no impediment to the admissibility of the author's claims under articles 7; 9 and 17, with regard to herself; articles 6; 7; 9, 14, paragraphs 1, 2, 3 (b), (d), (e) and (g) with regard to the author's sons, and proceeds to consider it on the merits.

Consideration of the merits

7.1 The Human Rights Committee has considered the communication in the light of all the information made available to it by the parties, as provided under article 5, paragraph 1, of the Optional Protocol. It notes that, while the State party has commented on the author's sons' cases and their conviction, it has not provided any information about the author's claims with regard to herself and her sons. In the absence of any pertinent information from the State party, due weight must be given to the author's allegations, to the extent that these have been properly substantiated.

7.2 The Committee has noted the author's description of the torture to which her sons were subjected to make them confess guilt (paras. 2.2, 2.3 and 2.6 above). She has identified the individuals alleged to have participated in these acts. The material submitted by the author also states that the allegations of torture were brought to the attention of the authorities by the victims themselves, and that they were ignored. In these circumstances, and in the absence of any pertinent explanation from the State party, due weight must be given to her allegations, in particular that the State party authorities did not properly discharge their obligation effectively to investigate complaints about incidents of torture. The Committee considers that the facts as submitted disclose a violation of article 7 in relation of the author's sons.

7.3 On the claim of a violation of the author's sons' rights under article 14, paragraph 3 (g), in that they were forced to sign a confession, the Committee must consider the principles that underlie this guarantee. It refers to its previous jurisprudence that the wording, in article 14, paragraph 3 (g), that no one shall "be compelled to testify against himself or confess guilt", must be understood in terms of the absence of any direct or indirect physical or psychological coercion by the investigating authorities on the accused with a view to obtaining a confession of guilt.[6] The Committee considers that it is implicit in this principle that the burden of proof that the confession was made without duress is on the prosecution. However, the Committee notes that in this case, the burden of proof whether the confession was voluntary was on the accused. The Committee notes that both the Tashkent Regional Court and the Supreme Court ignored the allegations of torture made by the author's sons. Therefore, the Committee concludes that the State party has violated article 14, paragraphs 2, and 3 (g).

7.4 As to the author's claim that her sons were denied access to a lawyer of their choosing during the pretrial investigation and the trial, the Committee also notes the author's contention that she was not informed of the date of her sons' trial and thus could not hire an independent lawyer to defend them at the trial. Their lawyer, subsequently hired by the author, was twice refused permission to see his clients after they were sentenced to death. The Committee recalls its jurisprudence that, particularly in cases involving capital punishment, it is axiomatic that the accused is effectively assisted by a lawyer at all stages of the proceedings.[7] In the circumstances of the case, and in the absence of pertinent explanations from the State party, the Committee considers that the legal assistance did not meet the required threshold of effectiveness. Therefore, the information before the Committee discloses a violation of article 14, paragraph 3 (b) and (d).

7.5 The Committee has noted the author's claim that the trial of her sons was unfair, since the court did not act impartially and independently (paras. 2.5 and 2.6 above). It also notes the author's contention that the trial of her sons was largely held in camera and that none of the witnesses were present in the court room despite numerous requests to this effect from all eight co-defendants, including Uigun and Oibek Ruzmetov. The judge denied these requests, without giving any reasons. In the absence of any pertinent State party information, the Committee concludes that the facts before it disclose a violation of article 14, paragraphs 1 and 3 (e), of the Covenant.

7.6 The Committee recalls[8] that the imposition of a sentence of death upon conclusion of a trial in which the provisions of the Covenant have not been respected constitutes a violation of article 6 of the Covenant. In the present case, the death sentences on Uigun and Oibek Ruzmetov was passed in violation of the right to a fair trial set out in article 14 of the Covenant, and was thus also in breach of article 6.

7.7 The Committee notes that the author's sons' pretrial detention was approved by the public prosecutor, and that there was no subsequent judicial review of the lawfulness of detention until they were brought before a court and sentenced on 24 July 1999 (Uigun) and 29 July 1999 (Oibek). The Committee observes that article 9, paragraph 3, is intended to bring the detention of a person charged with a criminal offence under judicial control and recalls that it is inherent to the proper exercise of judicial power, that it be exercised by an authority which is independent, objective and impartial in relation to the issues dealt with.[9] In the circumstances of the present case, the Committee is not satisfied that the public prosecutor may be characterized as having the institutional objectivity and impartiality necessary to be considered an "officer authorized to exercise judicial power" within the meaning of article 9, paragraph 3. The Committee therefore concludes that there has been a violation of this provision.

7.8 The Committee has considered the author's claim, which is made out in detail, that her deprivation of liberty by persons acting in an official capacity from 28 December 1998 to 6 February 1999 without charges and the subsequent failure of the State party to investigate these acts. It recalls that article 9, paragraph 1, is applicable to all forms of deprivation of liberty,[10] and considers that in the above circumstances and in the absence of pertinent explanation from the State party, the facts as submitted amount to an unlawful deprivation of liberty in violation of article 9, paragraph 1.

7.9 The Committee considers that in the absence of any explanation from the State party, the search of the author's house without warrant on 28 December 1998 (para. 2.1 above), amounts to a violation of article 17.

7.10 The Committee has noted the author's claim that the State party authorities ignored her requests for information and systematically refused to reveal her sons' situation or whereabouts. The Committee understands the continued anguish and mental stress caused to the author, as the mother of the condemned prisoners, by the persisting uncertainty of the circumstances that led to their execution, as well as the location of their gravesite. The secrecy surrounding the date of execution, and failure to disclose the place of burial have the effect of intimidating or punishing families by intentionally leaving them in a state of uncertainty and mental distress. The Committee considers that the authorities' failure to notify the author of the execution of her sons, amounts to inhuman treatment, in violation of article 7.[11]

7.11 The Committee considers that in the absence of any explanation from the State party, the author's exposure, handcuffed and naked, to her son, Uigun, on 5 January 1999 (para. 2.3 above), in itself amounts to inhuman and degrading treatment, contrary to article 7 and constitutes a violation thereof.

8. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts before it disclose violations of:

(a) The rights of Uigun and Oibek Ruzmetov, under articles 6; 7; 9, paragraph 3; 14, paragraphs 1, 2, 3 (b), (d), (e) and (g);

(b) The author's rights under articles 7, 9, paragraph 1; and 17.

9. In accordance with article 2, paragraph 3 (a), of the Covenant, the State party is under an obligation to provide the author with an effective remedy, including information on the location where her sons are buried, and compensation for the anguish she has suffered. The State party is also under an obligation to prevent similar violations in the future.

10. Bearing in mind that, by becoming a party to the Optional Protocol, the State party has recognized the competence of the Committee to determine whether there has been a violation of the Covenant or not and that, pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory or subject to its jurisdiction the rights recognized in the Covenant and to provide an effective remedy in case a violation has been established, the Committee wishes to receive from the State party, within 90 days, information about the measures taken to give effect to the Committee's Views. The State party is also requested to publish the Committee's Views.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the Committee's annual report to the General Assembly.]

Notes

[1] The Optional Protocol entered into force for the State party on 28 September 1995 (accession).

[2] The communication was received on 7 February 2000.

[3] *Piandiong v. The Philippines*, communication No. 869/1999, para. 5.1, Views adopted on 19 October 2000, *Khalilov v. Tajikistan*, communication No. 973/2001, Views adopted on 30 March 2005, para. 4.1, *Saidov v. Tajikistan*, communication No. 964/2001, Views adopted on 8 July 2004, para. 4.1.

[4] *Weiss v. Austria*, communication No. 1086/2002, para. 6.4, *Saidov v. Tajikistan*, communication No. 964/2001, Views adopted on 8 July 2004, para. 4.4.

[5] *H. v. Italy*, communication No. 565/1993, Inadmissibility decision of 8 April 1994, para. 4.2.

[6] *Berry v. Jamaica*, communication No. 330/1988, Views adopted on 4 July 1994, para. 11.7, *Nallaratnam Singarasa v. Sri Lanka*, communication No. 1033/2001, Views adopted on 21 July 2004, para. 7.4, and *Deolall v. Guyana*, communication No. 912/2000, Views adopted on 1 November 2004, para. 5.1.

[7] *Aliev v. Ukraine*, communication No. 781/1997, Views adopted on 7 August 2003, para. 7.3, *Robinson v. Jamaica*, communication No. 223/1987, Views adopted on 30 March 1989, para. 10.3, and *Brown v. Jamaica*, communication No. 775/1997, Views adopted on 23 March 1999, para. 6.6.

[8] *Levy v. Jamaica*, communication No. 719/1996, Views adopted on 3 November 1998, para. 7.3, *Marshall v. Jamaica*, communication No. 730/1996, Views adopted on 3 November 1998, para. 6.6. See also general comment No. 6 on article 6, para. 7.

[9] Communication No. 521/1992, *Kulomin v. Hungary*, Views adopted on 22 March 1996, para. 11.3, *Platonov v. Russian Federation*, communication No. 1218/2003, Views adopted on 1 November 2005, para. 7.2.

[10] General comment No. 8 on article 9, para. 1.

[11] Communication No. 886/1999, *Bondarenko v. Belarus*, Views adopted on 3 April 2003, para. 9.4, communication No. 887/1999, *Lyashkevich v. Belarus*, Views adopted on April 2003, para. 9.2, communication No. 973/2001, *Khaliliov v. Tajikistan*, Views adopted on 30 March 2005, para. 7.7.

G. Communication No. 959/2000, *Bazarov v. Uzbekistan* (Views adopted on 14 July 2006, eighty-seventh session)*

Submitted by:	Mr. Saimijon and Mrs. Malokhat Bazarov (not represented by counsel)
Alleged victim:	Nayimizhon Bazarov, the authors' son
State party:	Uzbekistan
Date of communication:	16 November 2000 (initial submission)
Subject matter:	Torture, unfair trial; habeas corpus
Substantive issues:	Imposition of a sentence to death rendered in an unfair trial
Procedural issues:	Level of substantiation of claim
Articles of the Covenant:	6; 7; 9; 10; 11; 14; 15
Articles of the Optional Protocol:	2

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 14 July 2006,

Having concluded its consideration of communication No. 959/2000, submitted to the Human Rights Committee on behalf of Mr. Nayimizhon Bazarov under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the author of the communication, and the State party,

Adopts the following:

Views under article 5, paragraph 4, of the Optional Protocol

1.1 The authors are Saimijon Bazarov (born in 1950) and his wife Malokhat, both Uzbek nationals. They submit the communication on behalf of their son, Nayimizhon Bazarov (executed pursuant a sentence to death of 11 June 1999 pronounced by the Samarkand Regional

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* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Nisuke Ando, Mr. Prafullachandra Natwarlal Bhagwati, Mr. Alfredo Castillero Hoyos, Ms. Christine Chanet, Mr. Walter Kälin, Mr. Ahmed Tawfik Khalil, Mr. Rajsoomer Lallah, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Ivan Shearer, Mr. Hipólito Solari-Yrigoyen and Mr. Roman Wieruszewski.

Court), and claim that he is a victim of violations by Uzbekistan of his rights under articles 6; 7; 9; 10; 11; 14; and 15, of the Covenant.[1] Although they do not invoke it specifically, the communication also appears to raise issues under article 7 in respect of the authors. They are not represented by counsel.

1.2 On 5 December 2000, pursuant to rule 92 of its rules of procedures, the Committee, acting through its Special Rapporteur on new communications and interim measures, requested the State party not to carry out the execution of Mr. Bazarov so as to enable the Committee to examine the present communication. On 26 January 2004, however, the State party informed the Committee that the execution of the alleged victim had already been carried out on 20 July 2000, i.e. prior to the submission (16 November 2000) and the registration of the case on 5 December 2000, and the formulation of the Committee's request for interim measures of protection.

The facts as submitted by the authors

2.1 On 27 May 1998, while Mr. Nayimizhon Bazarov was driving to Samarkand to visit his hospitalized sister, he was stopped in Urgut by two police officers (S.Dzh., deputy Chairman of the Urgut Regional Branch of the Ministry of Internal Affairs, and R.Kh. from the Criminal Search Office), who asked him to drive another policeman, E.S., to Dzhambay region and then to bring him back. The author's son allegedly refused to do so, claiming that he had urgent business; allegedly, the police officers expressed disappointment. Finally, he drove the policemen to the destination, but did not bring him back.

2.2 On 14 June 1998, while driving again, the author's son was stopped in Urgut by a group of police officers (two of whom, S.Dzh. and R.Kh. were present during the 27 May episode). He was brought to the (Urgut) Regional Department of the Ministry of Internal Affairs, allegedly without any warrant. There, allegedly, while being interrogated, he was beaten and threatened with having his family put in prison. Later the same day, he was charged with drug trafficking. Investigators searched his home, in the presence of witnesses, and after having hidden a small quantity of drugs under a carpet, they "discovered" it, which was duly recorded. The authors claim that their son could not request the review of the legality of his arrest and detention by a court, as no such possibility exists in the State party.

2.3 On 21 June, a confrontation was conducted between the authors' son and one G.H., in the presence of S.Dzh., an investigator, and Bazarov's lawyer.[2] G.H. affirmed that the author's son took part, together with other persons, in the murder of two individuals that took place in her house, in the night of 1 to 2 May 1998, to take possession of 100 grams of opium.

2.4 The case against the authors' son and eight other co-defendants was transmitted to the Samarkand Regional Court, and a court trial started on 12 April 1999. On 11 July 1999, the Court found the authors' son and one of his co-defendants guilty of murder, and other crimes, including drug trafficking, and sentenced them to death.[3]

2.5 According to the authors, their son and his co-defendants claimed in court that they were beaten and tortured during the preliminary investigation to force them give false evidence, and all claimed to be innocent of the murder; their son also claimed to be innocent of the drug-related charges. Allegedly, his co-defendants showed parts of their bodies "burned with cigarettes, covered with bruises, haematoma, swellings on their heads, broken teeth" and asked the presiding judge to order a medical examination in this relation. The court did not order a medical examination, but called two of the investigators, who denied any use of unlawful methods of interrogation during the pretrial investigation.

2.6 The authors claim that their son's trial did not meet the requirements for a fair trial: the criminal case was "fabricated" by the investigators, and the court based its conclusions mainly on the depositions of G.H. (which, according to the authors, should not have been taken into account because they were modified several times during the preliminary investigation) and on evidence extracted under torture from the defendants during the preliminary investigation. They assert that the court failed to establish their son's guilt without any reasonable doubt, and to solve a number of contradictions. They also assert that their son had an alibi - he was not in Urgut at the night of the crime, but was in Samarkand to meet them when they returned from holidays and their train arrived early in the morning - but allegedly it was not taken into account by the court.

2.7 On an unspecified date, Mr. N. Bazarov filed a cassation appeal against the Samarkand Regional Court judgement of 11 June 1999. On 24 December 1999, the Supreme Court upheld the judgement, thus confirming his death sentence. Domestic remedies have thus been exhausted.

The complaint

3. The authors claim that the above presented facts constitute a violation of their son's rights under articles 7; 9; 10; 11; 14, read together with article 6; and 15, of the Covenant. Although they do not invoke this provision specifically, the communication also appears to raise issues under article 7 in respect of the authors.

State party's observations

4.1 The State party presented its comments on 10 October 2002 and 15 December 2003. It affirms that according to the judgement of 11 June 1999, subsequently confirmed by a ruling of the Supreme Court on 24 December 1999, the alleged victim, premeditatedly, and acting in a criminal group with two other co-defendants (R. and M.), participated in the murder of two individuals to misappropriate 190 grams of opium. In addition, the alleged victim and R. were found guilty of having sold to one S., in March 1998, 100 grams of opium (constituting a "significant amount").

4.2 During a search conducted in the alleged victim's house on 14 June 1998, the investigators seized 1 gram of opium and 0.5 gram marijuana, and a special tube for use of narcotics.

4.3 The court found the alleged victim guilty of unlawful appropriation of narcotics obtained through a robbery, unlawful sale of narcotics, unlawful acquisition and sale of narcotics by an individual who had previously participated in the unlawful trade in drugs, premeditated murder under aggravated circumstances of two individuals committed with a particular violence, acting with selfish motivations, carried out by a group.

4.4 According to the State party, the authors' son's guilt has been proven by the material contained in the criminal case file, and his acts were qualified correctly. In defining his penalty, the court has evaluated the character of the accomplished act, the fact that it was committed for selfish ends, by a group of people, in a particularly violent manner, that it related to an unlawful sale of a significant amount of narcotics, that the author had no "socially-useful" occupation. The court concluded that he constituted a danger for society, and that his correction was impossible.

Authors' comments

5.1 On 19 November 2003, the authors commented on the State party's submission. According to them,, the State party has failed to provide detailed answers on the merits of the communication, nor has it addressed the claim on article 9 (lack of judicial control over arrest/pretrial detention); this was due to the lack of such judicial supervision within the State party's legal order.[4]

5.2 On the article 7 claim, they argue that the State party has failed to undertake an effective investigation into the allegation of torture/ill-treatment their son and his co-defendants were subjected to in the Urgut City Police station. They reiterate that their son did not confess guilt, but that the other co-defendants were forced to give incriminating testimonies against him. They reaffirm that during the trial, the alleged victim and his co-defendants testified that they were tortured and severely beaten, and also some of them were subjected to insertion of empty bottles in their anuses by the investigators. Mr. Bazarov, his lawyer, and the other co-defendants requested the presiding judge to investigate those abuses, and to undertake medical examinations, but their requests were rejected. Although the presiding judge summoned two of the law-enforcement officers in question and interrogated them as to whether they used torture during the investigation, after their reply "No", they were allowed to leave the room. According to the authors, the State party similarly failed to undertake any investigation in the context of the present communication.

5.3 As to the alleged violation of article 14, the authors reiterate that their son's trial did not meet the requirements of a fair trial. They claim that the presiding judge conducted the trial in a biased and partial manner, read the indictment himself, and questioned some witnesses; he did not "insist that a prosecutor is present" throughout the trial, and a prosecutor was thus present only during 15 of a total of 20 trial sessions, and was absent at the opening of the trial. The authors claim that the presiding judge did not solve any contradiction that had appeared during the examination of the criminal case, and, ultimately, he imposed a death sentence notwithstanding that the prosecutor requested 20 years' prison term as Bazarov's penalty.

5.4 The authors recall that the main argument of the present communication is that their son's presumption of innocence was violated and that he was sentenced to death on the basis of "doubtful" evidence and confessions obtained under torture, and on the basis of "highly questionable evidence". They contend that the court failed to make an adequate assessment of their son's exculpating evidence, and "boldly" rejected his defence alibi. They contend that the State party has failed to submit a detailed reply on these issues.

5.5 As to the alleged violation of article 6, of the Covenant, the authors reaffirm that their son's right to life was violated because he was sentenced to death after an unfair trial.

5.6 Finally, the authors state that they are unaware of their son's whereabouts, and contend that the officials ignored all their requests in this respect. Allegedly, the only information they received was obtained in September 2002 through "unofficial channels", assuring them that their son was alive. The authors claim that the secrecy surrounding their son's whereabouts imposes unbearable suffering on their entire family, and that every day they live surrounded by a situation of uncertainty and psychological pain.

Further information from the State party

6.1 The State party presented further observations on 26 January 2004. It reiterates its previous observations and affirms that the case may be considered groundless on the merits. It contends that the authors' allegations of violation of article 7 are unsubstantiated. Contrary to what is indicated in the communication, the Supreme Court of Uzbekistan unequivocally states that according to the trial records, neither the alleged victim nor his co-defendants or lawyers, ever requested the presiding judge to appoint a medical commission to investigate allegations of torture or ill-treatment. At the same time, according to the State party, "internal safeguard procedures" of law-enforcement agencies had not revealed any misconduct during pretrial detention of Mr. Bazarov.

6.2 According to the State party, the allegations under article 14 are also unsubstantiated. Contrary to the authors' allegations, the trial records show that the court trial started on 12 April 1999, in the presence of a prosecutor, defence lawyers, interpreter, all defendants, and victims. The trial is said to have been conducted in a continuous manner, and a prosecutor, lawyers, and defendants were present at all times, and all interrogations were conducted "in the presence of the prosecutor, lawyers, and defendants".

6.3 The State party finally states that according to its competent authorities, Bazarov's sentence was carried out on 20 July 2000, i.e. prior to the registration of the communication by the Committee and to the formulation of its request for interim measures under rule 92 of its rules of procedure, on 5 December 2000.

Issues and proceedings before the Committee

Admissibility considerations

7.1 Before considering any claim contained in a communication, the Human Rights Committee must, in accordance with rule 93 of its rules of procedure, decide whether or not the communication is admissible under the Optional Protocol to the Covenant.

7.2 The Committee notes that the same matter is not being examined under another international procedure of investigation or settlement, and that domestic remedies have been exhausted. The requirements of article 5, paragraph 2 (a) and (b), of the Optional Protocol, have therefore been met.

7.3 The Committee has noted the authors' claim under articles 7 and 10, to the effect that their son was subjected to torture during the preliminary investigation, and that his claims in this respect were ignored by the court. The State party objects that neither the authors' son nor his co-defendants or lawyers ever requested the court to carry out a medical examination on this issue, whereas "internal safeguard procedures" of the law-enforcement agencies had not revealed any misconduct during the pretrial detention. The Committee notes that the material before it, in particular the alleged victim and his lawyer's appeals against the judgement of 11 June 1999 of the Samarkand Regional Court, do not contain any information whatsoever about Mr. Bazarov's mistreatment or torture. In addition, no explanation was provided by the authors on whether the alleged victim, his relatives, or his lawyer, complained about these acts during the preliminary investigation. In the circumstances, the Committee concludes that the authors have failed to sufficiently substantiate this particular claim, for purposes of admissibility, and this part of the communication is inadmissible under article 2 of the Optional Protocol.

7.4 The Committee has further noted the authors' mere allegation that their son's rights under articles 11 and 15, of the Covenant were violated. In the absence of any information in this respect, the Committee decides that the authors have failed to sufficiently substantiate their claim, for purposes of admissibility. Accordingly, this part of the communication is inadmissible under article 2, of the Optional Protocol.

7.5 The Committee considers that the remaining claims of the present communication, raising issues under article 9, and article 14, paragraph 1, read together with article 6, of the Covenant, in relation to the alleged victim, and article 7, of the Covenant, with respect to the authors, are sufficiently substantiated, for purposes of admissibility.

Consideration of the merits

8.1 The Human Rights Committee has considered the present communication in the light of all the information made available to it by the parties, as provided in article 5, paragraph 1, of the Optional Protocol.

8.2 The authors have claimed that their son was unable to have the decision to place him in pretrial detention reviewed by a judge or other officer authorized by law to exercise judicial power, because Uzbek law does not provide, for such a possibility. The State party has not refuted this allegation. The Committee observes that the State party's criminal procedure law provides that decisions for arrest/pretrial detention are approved by a prosecutor, whose decisions are subject to appeal before a higher prosecutor only, and cannot be challenged in court. It notes that author's son was arrested on 14 June 1998, placed on pretrial detention on 18 June 1998, and that there was no subsequent judicial review of the lawfulness of detention until he was brought before a court, on 12 April 1999. The Committee recalls[5] that article 9, paragraph 3, is intended to bring the detention of a person charged with a criminal offence under judicial control and recalls that it is inherent to the proper exercise of judicial power, that it be exercised by an authority which is independent, objective and impartial in relation to the issues dealt with. In the circumstances of the present case, the Committee is not satisfied that the public prosecutor may be characterized as having the institutional objectivity and impartiality necessary to be considered an "officer authorized to exercise judicial power" within the meaning of article 9, paragraph 3. The Committee therefore concludes that there has been a violation of this provision.

8.3 The Committee has noted the authors' allegations that their son's co-defendants were beaten and tortured during the investigation to the point that they gave false testimony incriminating him and served as a basis for his conviction. The Committee notes that from the material before it, it transpires that the alleged victim and his lawyer have claimed that the co-defendants showed marks of torture in court and affirmed that their testimonies were obtained under torture, in response to which the presiding judge summoned two of the investigators in question, and asked them whether they used unlawful methods of investigation, and dismissed them after receiving a negative reply. The State party merely replied that the alleged victim's co-defendants or lawyers did not request the court to carry out any medical examination in this regard, and that unspecified "internal safeguard procedures" of the law-enforcement agencies had not revealed any misconduct during the pretrial detention. In this connection, the Committee notes that the State party has not adduced any documentary evidence of any inquiry conducted in the context of the court trial or in the context of the present communication. It recalls that the burden of proof (on the use of torture) cannot rest alone on the author of a communication, especially considering that the author and the State party do not always have equal access to the evidence and that frequently the State party alone has access to relevant information; it is implicit in article 4 (2) of the Optional Protocol that the State party has the duty to investigate in good faith all allegations of violation of the Covenant made against it and its authorities.[6] In the circumstances, the Committee considers that due weight must be given to the authors' allegations, as the State party has failed to refute the allegations that the alleged victim's co-defendants were tortured to make them give false evidence against him. Accordingly, the Committee concludes that the facts as presented reveal a violation of the alleged victim's rights under article 14, paragraph 1, of the Covenant.

8.4 In light of the above conclusion, and bearing in mind its constant jurisprudence to the effect that that an imposition of a sentence of death rendered in a trial that did not meet the requirements of a fair trial amounts also to a violation of article 6 of the Covenant,[7] the Committee concludes that the alleged victim's rights under this provision have also been violated.

8.5 The Committee has taken note of the authors' claim that the authorities did not inform them about their son's situation for a long period of time, and learned about his execution a long time after his death. It notes that the State party's law does not allow, for a family of an individual under sentence of death, to be informed either of the date of execution or of the location of the burial site of an executed prisoner.[8] The Committee understands the continued anguish and mental stress caused to the authors, as the mother and father of a condemned prisoner, by the persisting uncertainty of the circumstances that led to his execution, as well as the location of his gravesite. It recalls that the secrecy surrounding the date of execution, and the place of burial, as well as the refusal to hand over the body for burial, have the effect of intimidating or punishing families by intentionally leaving them in a state of uncertainty and mental distress.[9] The Committee considers that the authorities' initial failure to notify the authors of the execution of their son and the failure to inform them of his burial place, amounts to inhuman treatment of the authors, in violation of article 7 of the Covenant.

9. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the View that the facts before it disclose a violation of Mr. Naymijon Bazarov's rights under article 9, paragraph 3, and article 14, paragraph 1, read together with article 6, of the Covenant, and the rights of his parents, Mr. and Mrs. Bazarov, under article 7.

10. In accordance with article 2, paragraph 3 (a), of the Covenant, the State party is under an obligation to provide the authors of the communication with an effective remedy, including information on the location where their son is buried, and effective reparation for the anguish suffered. The State party is also under an obligation to prevent similar violations in the future.

11. Bearing in mind that, by becoming a party to the Optional Protocol, the State party has recognized the competence of the Committee to determine whether there has been a violation of the Covenant or not and that, pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory or subject to its jurisdiction the rights recognized in the Covenant and to provide an effective and enforceable remedy in case a violation has been established, the Committee wishes to receive from the State party, within 90 days, information about the measures taken to give effect to the Committee's Views. The State party is also requested to publish the Committee's Views.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the Committee's annual report to the General Assembly.]

Notes

[1] The Optional Protocol entered into force for the State party on 28 December 1995.

[2] According to the authors, their son was presented to his lawyer on 16 June 1998. It is not clear from the case file whether the lawyer was appointed ex-officio, or was privately hired.

[3] The eight others co-accused were sentenced to different terms of imprisonment.

[4] A Presidential Decree of 8 August 2005, provides that, within the frame of a set of reforms, court control over decisions of pre-trial detention should be enacted on 1 January 2008.

[5] See, inter alia, *Mrs. Darmon Sultanova (Ruzmetovs) v. Uzbekistan*, communication No. 915/2000, Views adopted on 30 March 2006, para. 7.7.

[6] See, inter alia, communication No. 30/78, *Irene Bleier Lewenhoff and Rosa Valino de Bleier v. Uruguay*, Views adopted on 29 March 1982, para. 13.3.

[7] See, inter alia, *Siragev v. Uzbekistan*, communication No. 907/2000, Views adopted on 1 November 2005, para. 6.4.

[8] Pursuant to article 140 of the State party's Code on the Execution of Criminal Penalties, the body of the executed person is not given for burial, and the place of burial is not revealed.

[9] See, for example, *Kholinisso Aliboeva (Valichon Aliboev) v. Tajikistan*, communication No. 985/2001, Views adopted on 18 October 2005, para. 6.7; *Khalilova v. Tajikistan*, communication No. 973/2001, Views adopted on 30 March 2005; *Lyashkevich v. Belarus*, communication No. 887/1999, Views adopted on 3 April 2003.

H. Communication No. 985/2001, *Aliboev v. Tajikistan*
(Views adopted on 18 October 2005, eighty-fifth session)*

Submitted by:	Mrs. Kholinisso Aliboeva (not represented by counsel)
Alleged victim:	Mr. Valichon Aliboev (deceased husband of the author)
State party:	Tajikistan
Date of communication:	10 July 2001 (initial submission)
Subject matter:	Imposition of death penalty after an unfair trial and use of torture during preliminary investigation; absence of legal representation; scope of review of a Supreme Court's decision rendered at first instance
Procedural issues:	-
Substantive issues:	Right to life, right to a fair trial; prohibition of torture; right of convicted person to have the conviction and sentence reviewed by a higher tribunal according to law
Articles of the Covenant:	6, 7, 14, paragraphs 1, 3 (d) and (g), and 5, of the Covenant
Article of the Optional Protocol:	2

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 18 October 2005,

Having concluded its consideration of communication No. 985/2001, submitted to the Human Rights Committee on behalf of Mr. Valichon Aliboev under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the author of the communication, and the State party,

Adopts the following:

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* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Prafullachandra Natwarlal Bhagwati, Ms. Christine Chanet, Mr. Maurice Glèlè Ahanhanzo, Mr. Walter Kälin, Mr. Ahmed Tawfik Khalil, Mr. Rajsoomer Lallah, Ms. Elisabeth Palm, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Ivan Shearer, Mr. Hipólito Solari-Yrigoyen, Ms. Ruth Wedgwood and Mr. Roman Wieruszewski.

Views under article 5, paragraph 4, of the Optional Protocol

1.1 The author of the communication is Mrs. Kholinisso Aliboeva, an Uzbek national and Tajik resident, who submits the communication on behalf of her husband, Valichon Aliboev, also an Uzbek born in 1955, who, at the time of the submission of the communication was awaiting execution in Dushanbe, following a death sentence imposed by the Supreme Court of Tajikistan on 24 November 2000. The author claims that her husband is a victim of violations by Tajikistan of his rights under articles 2, paragraph 3 (a); 6, paragraphs 1 and 2; 7; and 14, paragraphs 1, 3 (g) and (f), and 5, of the International Covenant on Civil and Political Rights. While the author does not invoke this provision specifically, the communication appears also to raise issues under article 14, paragraph 3 (d) in relation to her husband, and under article 7 in as much as she is herself concerned (notification of her husband's execution). The author is not represented by counsel.[1]

1.2 On 11 July 2001, in accordance with rule 92 (old rule 86) of its rules of procedure, the Human Rights Committee, acting through its Special Rapporteur on interim measures and new communications, requested the State party not to carry out the death sentence against Mr. Aliboev while his case was pending before the Committee. No reply was received from the State party. By letter of 30 October 2001, the author informed the Committee that in September 2001 she received a Certificate of Death, pursuant to which her husband had been executed on 7 July 2001 (i.e. prior to the receipt of the communication by the Committee[2]).

Factual background

2.1 Mr. Aliboev arrived in Tajikistan in 1999, to look for work "because of the poor living conditions" in the Ferghana Valley (Uzbekistan). In Dushanbe, he became acquainted with one Mulloakhed, who invited him to join his criminal gang, to which he agreed. According to the author, her husband was not present at the moment of the formation of the gang and he was not aware of its previous criminal activities.

2.2 In March 2000, Mr. Aliboev, together with other members of the gang took a 15 year old boy (U.) hostage and demanded ransom from his father. During the hostage-taking, Aliboev allegedly only stood guard at the entrance, and, afterwards U. was brought to his apartment. Aliboev allegedly looked after the hostage and gave him food and water.

2.3 Allegedly, the father refused to pay the ransom. Allegedly, a member of the gang ordered as Aliboev to administer an anaesthetic injection to the hostage, after which one of his fingers was cut off. A photograph and the finger were sent to the hostage's father, who then paid the ransom.

2.4 On 11 May 2000, officers of the Department for Fight Against Organized Crime of the Ministry of Interior arrested Mr. Aliboev. According to the author, he was kept "incommunicado" until 18 May 2000, when his sister Salima was allowed to visit him. Allegedly, she found him in a poor physical condition - he was bruised, his face was swollen from beatings, and his body bore marks of torture. Allegedly, since his arrest, Aliboev had been beaten constantly and subjected to torture to make him confess guilt and his internal organs were seriously injured. Some 20 days after his arrest (no specific date is indicated), he was transferred to an Investigation Detention Centre (SIZO), suffering pain in his kidneys and stomach. The author adds that her husband's lawyer was only appointed after his indictment (the exact date is not provided).

2.5 On 24 November 2000, the Supreme Court of Tajikistan found the gang guilty of 15 criminal acts (11 armed robberies, one murder and one attempted murder, and 3 hostage takings). The author points out that notwithstanding that her husband had participated in only one of the crimes attributed to the gang he received the maximum sentence, while "active" gang members who had participated in several crimes received equal punishment or were sentenced to a prison term.

2.6 The author claims that the sentence of the Supreme Court of 24 November 2000 became executory immediately, and Tajik law does not allow for an appeal from such convictions. The author's husband did request the Prosecutor General and the Chairman of the Supreme Court to introduce a protest following the supervisory procedure, but his claims were rejected.

2.7 The author contends that neither during the investigation nor in court was her husband offered the services of an interpreter, although he was an Uzbek, had received his school education in Russian, and only had basic knowledge of Tajik. He was thus unable to understand the essence of the charges brought against him nor the witnesses' and victims' depositions. She contends that Aliboev did not request an interpreter during the investigation, because of the partiality of the investigator and the torture he had been subjected to, while in court he was not even asked whether he needed the services of an interpreter.

2.8 In her letter to the Committee of 30 October 2001, the author explains that in August 2001 her husband's lawyer was informed by the Supreme Court of Tajikistan that Mr. Aliboev had been executed. In September 2001 (exact date not provided), the author received an official notification and a Certificate of Death, according to which her husband was executed by firing squad on 7 July 2001. She claims that although the State institutions were aware of the execution, no one informed her when she applied to them on her husband's behalf between July and September 2001 but that everywhere she received "assurances for assistance". She invites the Committee to continue the examination of her husband's case.

The complaint

3.1 The author claims that her husband's sentence was unfair and disproportionate in relation to the acts he was convicted of, in violation of article 14, paragraph 1, of the Covenant.

3.2 She also claims that her husband was the victim of violations of his rights under articles 7 and 14, paragraph 3 (g), of the Covenant, because he was beaten and tortured after his arrest to make him confess guilt, and the confession was used against him in court.

3.3 Article 14, paragraph 3 (f), of the Covenant is said to have been violated, as the author's husband had not been offered the services of an interpreter.

3.4 Mr. Aliboev's right to have his conviction reviewed by a higher tribunal is said to have been violated, contrary to the requirements of article 14, paragraph 5, of the Covenant.

3.5 While she does not invoke the provision specifically, the author's claim that her husband had been offered the services of a lawyer only upon presentation of the charges against him may raise issues under article 14, paragraph 3 (d), of the Covenant.

3.6 The author claims that her husband was arbitrarily deprived of life following an unfair trial, in violation of articles 6 and 14 of the Covenant.

3.7 Finally and notwithstanding the fact that the author does not raise the issue specifically, the communication also appears to raise issues under article 7, in her own respect, because of the failure of the authorities to inform the author in advance of the date of her husband's execution, or subsequently, of the location of his burial site.

Absence of State party cooperation

4. By notes verbales of 11 July 2001, 5 November 2001, 19 December 2002, and 10 November 2004, the State party was requested to submit to the Committee information on the admissibility and merits of the communication. The Committee notes that this information has still not been received. The Committee regrets the State party's failure to provide any information with regard to admissibility or the substance of the author's claims. It recalls that it is implicit in the Optional Protocol that States parties make available to the Committee all information at their disposal.[3] In the absence of any observations from the State party, due weight must be given to the author's allegations, to the extent that these have been sufficiently substantiated.

Issues and proceedings before the Committee

Consideration of admissibility

5.1 Before considering any claim contained in a communication, the Human Rights Committee must, in accordance with rule 93 of its rules of procedure, decide whether or not the communication is admissible under the Optional Protocol to the Covenant.

5.2 The Committee notes that the same matter is not being examined under any other international procedure of investigation and settlement.

5.3 With regard to the author's claim under article 14, paragraph 3 (g), concerning the lack of interpretation during the investigation and in court, the Committee has noted that she had not indicated what steps, if any, her husband had taken to submit this allegation to the competent authorities and in court, and what the eventual outcome was. The Committee finds that in respect of this particular claim, domestic remedies have not been exhausted. Accordingly, the Committee finds that this part of the communication is inadmissible under article 5, paragraph 2 (b) of the Optional Protocol.

5.4 The Committee has also noted the author's claim that her husband's sentence was unfair and disproportionate, in violation of article 14, paragraph 1, of the Covenant. Although the State party has presented no observations, the Committee notes that this claim relates to an evaluation of facts and evidence. It recalls its jurisprudence that it is generally for the courts of States parties to the Covenant to evaluate facts and evidence in a particular case, unless it can be ascertained that it was clearly arbitrary or amounted to a denial of justice.[4] The material before the Committee does not reveal that the evaluation of evidence or the conduct of the trial suffered from such defects. In the circumstances, it considers that the author has failed to sufficiently substantiate her claim in this relation. Accordingly, this part of the communication is inadmissible under article 2, of the Optional Protocol.

5.5 The Committee considers the remainder of the author's claims sufficiently substantiated, for purposes of admissibility, in that they appear to raise issues under articles 6, 7, and 14, paragraphs 3 (d) and (g), and 5, of the Covenant. It proceeds to their examination on the merits.

Examination of the merits

6.1 The Human Rights Committee has considered the present communication in the light of all the information made available to it by the parties, as required under article 5, paragraph 1, of the Optional Protocol.

6.2 The Committee has taken note of the author's allegation that following his arrest on 11 May 2000, her husband was beaten and tortured by investigators. In substantiation, she affirms that Mr. Aliboev's sister had seen him on 18 May 2000, and he displayed signs of beatings and torture. In the absence of any State party information, due weight must be given to the author's duly substantiated claim. The Committee therefore considers that the facts before it justify the conclusion that Mr. Aliboev was subjected to treatment in violation of article 7 of the Covenant.

6.3 As the above-mentioned acts were inflicted on Mr. Aliboev by the investigators, with a view to making him confess guilt in several crimes, the Committee considers that the facts before it also disclose a violation of article 14, paragraph 3 (g), of the Covenant.

6.4 The Committee notes the author's claim that her husband was not represented by a lawyer until after his indictment, i.e. during a period when he was subjected to beatings and torture, and that the State party has not refuted this allegation. The Committee recalls its jurisprudence that, particularly in capital cases, it is axiomatic that the accused must be effectively assisted by a lawyer at all stages of the proceedings.[5] In the present case, the author's husband faced capital charges, and was without any legal defence during the preliminary investigation. It remains unclear from the material before the Committee whether the author or her husband requested legal assistance, or sought to engage a private lawyer. The State party, however, has not presented any explanation on this issue. Accordingly, the Committee is of the view that the facts before it reveal a violation of Mr. Aliboev's right under article 14, paragraph 3 (d), of the Covenant.

6.5 The author further claimed that her husband's right to have his death sentence reviewed by a higher tribunal according to law was violated. From the documents available to the Committee, it transpires that on 24 November 2000, Mr. Aliboev was sentenced to death at first instance by the Supreme Court. The judgement mentions that it is final and not subject to any further appeal. The Committee recalls that even if a system of appeal may not be automatic, the right to appeal under article 14, paragraph 5, imposes on the State party a duty substantially to review, both on the basis of sufficiency of the evidence and of the law, the conviction and sentence, such that the procedure allows for due consideration of the nature of the case.[6] In the absence of any explanation from the State party, the Committee considers that the absence of a possibility to appeal judgements of the Supreme Court passed at first instance to a higher judicial instance falls short of the requirements of article 14, paragraph 5. Consequently, there has been a violation of this provision.[7]

6.6 With regard to the author's remaining claim under article 6 of the Covenant, the Committee recalls that the imposition of a sentence of death upon conclusion of a trial in which the provisions of the Covenant have not been respected constitutes a violation of article 6 of the Covenant. In the current case, the sentence of death on the author's husband was passed, and subsequently carried out, in violation of the right to a fair trial as set out in article 14 of the Covenant, and therefore also in violation of article 6, paragraph 2, thereof.

6.7 The Committee has taken note of the author's claim that the authorities did not inform her about her husband's execution but continued to acknowledge her intercessions on his behalf following the execution. The Committee notes that the law then in force did not allow for a family of an individual under sentence of death to be informed either of the date of execution or the location of the burial site of the executed prisoner. The Committee understands the continued anguish and mental stress caused to the author, as the wife of a condemned prisoner, by the persisting uncertainty of the circumstances that led to his execution, as well as the location of his gravesite. It recalls that the secrecy surrounding the date of execution, and the place of burial, as well as the refusal to hand over the body for burial, have the effect of intimidating or punishing families by intentionally leaving them in a state of uncertainty and mental distress. The Committee considers that the authorities' initial failure to notify the author of the execution of her husband and the failure to inform her of his burial place, amounts to inhuman treatment of the author, in violation of article 7 of the Covenant.[8]

7. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts before it disclose a violation of Mr. Aliboev's rights under articles 6, paragraph 2; 7; and 14, paragraphs 1, 3 (d) and (g) and 5 of the Covenant, as well as under article 7 in relation to Ms. Aliboeva herself.

8. Under article 2, paragraph 3 (a), of the Covenant, the State party is under an obligation to provide the author with an appropriate remedy, including appropriate compensation. The State party is also under an obligation to prevent similar violations in the future.

9. Bearing in mind that, by becoming a party to the Optional Protocol, the State party has recognized the competence of the Committee to determine whether there has been a violation of the Covenant or not and that, pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory or subject to its jurisdiction the rights recognized in the Covenant and to provide an effective and enforceable remedy in case a violation has been established, the Committee wishes to receive from the State party, within 90 days, information about the measures taken to give effect to these Views. The State party is also requested to publish the Committee's Views.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently to be issued in Arabic, Chinese and Russian as part of the Committee's annual report to the General Assembly.]

Notes

[1] The Covenant and the Optional Protocol entered into force for the State party on 4 April 1999.

[2] The communication was received on 11 July 2001.

[3] See, inter alia, *Khomidova v. Tajikistan*, communication No. 1117/2002, Views adopted on 29 July 2004, and *Maryam Khalilova v. Tajikistan*, communication No. 973/2001, Views adopted on 30 March 2005.

[4] See communication No. 541/1993, *Errol Simms v. Jamaica*, Inadmissibility decision adopted on 3 April 1995, para. 6.2.

[5] See for example, *Aliev v. Ukraine*, communication No. 781/1997, Views adopted on 7 August 2003, *Robinson v. Jamaica*, communication No. 223/1987, Views adopted on 30 March 1989, *Brown v. Jamaica*, communication No. 775/1997, Views adopted on 23 March 1999.

[6] See *Maryam Khalilova v. Tajikistan*, communication No. 973/2001, Views adopted on 30 March 2005, *Domukovsky et al. v. Georgia*, communication No. 623-627/1995, Views adopted on 6 April 1998, and *Saidova v. Tajikistan*, communication No. 964/2001, Views adopted on 8 July 2004.

[7] See for example, *Maryam Khalilova v. Tajikistan*, communication No. 973/2001, Views adopted on 30 March 2005, *Aliev v. Ukraine*, communication No. 781/1997, Views adopted on 7 August 2003, *Robinson v. Jamaica*, communication No. 223/1987, Views adopted on 30 March 1989, *Brown v. Jamaica*, communication No. 775/1997, Views adopted on 23 March 1999.

[8] See, for example, *Khalilova v. Tajikistan*, communication No. 973/2001, Views adopted on 30 March 2005, and *Lyashkevich v. Belarus*, communication No. 887/1999, Views adopted on 3 April 2003.

I. Communication No. 992/2001, *Bousroual v. Algeria*
(Views adopted on 30 March 2006, eighty-sixth session)[*]

Submitted by:	Louisa Bousroual (represented by counsel)
Alleged victim:	Salah Saker
State party:	Algeria
Date of communication:	9 February 2000 (date of initial letter - received by the Secretariat on 20 October 2000)
Subject matter:	Disappearances, incommunicado detention, trial in absentia
Procedural issues:	None
Substantive issues:	Right to liberty and security of person; arbitrary arrest and detention; right to be brought promptly before a judge; right to counsel; right to life; prohibition of cruel, inhuman and degrading treatment and punishment; trial in absentia leading to the death penalty
Articles of the Covenant:	2, paragraph 3; 6, paragraph 1; 7; 9, paragraphs 1, 3 and 4; 10, paragraph 1; and 14, paragraph 3
Articles of the Optional Protocol:	2 and 5, paragraph 2 (a)

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 30 March 2006,

Having concluded its consideration of communication No. 992/2001, submitted to the Human Rights Committee on behalf of Louisa Bousroual under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the author of the communication, and the State party,

Adopts the following:

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[*] The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Nisuke Ando, Mr. Prafullachandra Natwarlal Bhagwati, Ms. Christine Chanet, Mr. Maurice Glèlè Ahanhanzo, Mr. Edwin Johnson, Mr. Walter Kälin, Mr. Ahmed Tawfik Khalil, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Ivan Shearer, Mr. Hipólito Solari-Yrigoyen and Mr. Roman Wieruszewski.

Views under article 5, paragraph 4, of the Optional Protocol

1. The author of the communication, dated 9 February 2000, is Mrs. Louisa Bousroual, an Algerian national residing in Constantine (Algeria). She submits the communication on behalf of her husband, Mr. Salah Saker, an Algerian national born on 10 January 1957 in Constantine (Algeria) who has been missing since 29 May 1994. The author claims that her husband is a victim of violations by Algeria of articles 2, paragraph 3; 6, paragraph 1; 9, paragraphs 1, 3 and 4; 10, paragraph 1; and 14, paragraph 3, of the International Covenant on Civil and Political Rights (the "Covenant"). The author is represented by counsel. The Covenant and the Optional Protocol to the Covenant entered into force for the State party on 12 December 1989.

The facts as presented by the author

2.1 Mr. Saker, a teacher, was arrested without a warrant on 29 May 1994 at 18.45 at his home, as part of a police operation carried out by agents of the Wilaya of Constantine (administrative division of the town of Constantine). At the time of his arrest, Mr. Saker was a member of the Front Islamiste de Salut (Islamic Salvation Front), a prohibited political party for which he had been elected in the annulled legislative elections of 1991.

2.2 In July 1994 the author wrote to the Director of Public Prosecutions (*Procureur de la République*) and requested to be informed about the reasons for her husband's arrest and continued detention. At the time of his arrest, the longest pretrial detention authorized by Algerian law was 12 days, for persons suspected of the most serious offences provided for in the Algerian criminal code, namely terrorist or subversive acts.[1] Further, the law required that the police officer responsible for the questioning of the suspect allow him contact with his family.[2]

2.3 The author did not receive a satisfactory reply from the Director of Public Prosecutions and, on 29 October 1994, wrote to the President of the Republic, the Minister of Justice, the Minister of the Interior, the Security Officer of the President of the Republic (*Délégué à la Sécurité auprès du Président de la République*), and the Head of Military Area No. 5.

2.4 As none of these persons replied, the author lodged a complaint with the Director of Public Prosecutions of the Tribunal of Constantine on 20 January 1996 against the security services of Constantine for the arbitrary arrest and detention of Mr. Saker. She requested that the persons responsible be brought to justice, pursuant to article 113, paragraph 2, of the Criminal Procedure Code. By letter of 25 January 1996, the author alerted the Ombudsman of the Republic (*Médiateur de la République*). She also requested information about her husband from the Director General of National Security on 28 January 1996.

2.5 As none of these bodies replied, the author wrote to the President of the National Observatory for Human Rights (*Observatoire National des Droits de l'Homme*) on 27 September 1996 to inform him of the difficulties which she was facing in obtaining information about her husband. She also requested legal aid and assistance.

2.6 On 27 February 1997 the author received a letter from the judicial Police section of the Security of Constantine (*Service de la Police judiciaire de la Sûreté de la Wilaya de*

Constantine), forwarding a copy of decision No. 16536/96 of the Director of Public Prosecutions of the Tribunal of Constantine dated 4 September 1996. This decision relates to the complaint which the author had lodged a year earlier; it informed her that her husband was wanted and had been arrested by the judicial police section of the Security of Constantine, then transferred to the Territorial Centre for Research and Investigation (*Centre Territorial de Recherches et d'Investigation, the "Territorial Centre"*) of Military Area No. 5 on 3 July 1994, as evidenced by a receipt of handover No. 848 of 10 July 1994. The author highlights that this decision does not indicate the reasons for her husband's arrest, nor does it clarify what steps, if any, were taken pursuant to her complaint of 20 January 1996, such as investigating the actions of the Territorial Centre.

2.7 On 10 December 1998 the National Observatory for Human Rights informed the author that, according to information received from the security services, Mr. Saker had been kidnapped by a non-identified armed group while in the custody of the Territorial Centre, and that the authorities did not have any other information as to his whereabouts. The letter from the Observatory does not clarify the grounds on which her husband was arrested and detained. The author understood the letter as informing her of her husband's death.

2.8 Lastly, the author states, on the one hand, that she has not been informed of either her husband's fate or his whereabouts and, on the other, that he underwent prolonged incommunicado detention; these allegations could raise issues under article 7 of the Covenant.

The complaint

3.1 The author claims that Mr. Saker is a victim of a violation of articles 2, paragraph 3; 6, paragraph 1; 9, paragraphs 1, 3 and 4; 10, paragraph 1; and 14, paragraph 3, of the Covenant, in view of his alleged arbitrary arrest and detention; because the Algerian authorities did not conduct a thorough and in-depth investigation; nor instigate any proceedings, despite the author's numerous requests. The author's husband was not promptly brought before a judge, nor was he granted contact with his family, nor was he granted rights associated with detention (in particular access to a lawyer, the right to be informed promptly of the reasons for his arrest, and trial without undue delay). The author also claims that the authorities failed to protect Mr. Saker's right to life.

3.2 The author claims to have exhausted all domestic remedies: remedies before judicial authorities, before independent administrative bodies responsible for human rights (the Ombudsman and the National Observatory for Human Rights), as well as the highest State authorities. She argues that her request for an investigation into the arrest, detention and disappearance of her husband was not acceded to. She claims that the judicial remedies which she initiated are manifestly unavailable and ineffective as, to her knowledge, no steps have been taken against the security services (police or Territorial Centre), which in her view are responsible for the arrest and disappearance of her husband. The author claims that the scarce responses and information she has received from the authorities aim to further delay the legal proceedings.

The State party's submission on the admissibility and merits of the communication and author's comments

4.1 By note verbale of 31 January 2002, the State party contests the admissibility of the communication for non-exhaustion of domestic remedies. Of the various bodies seized by the author, only the Director of Public Prosecutions of the Tribunal of Constantine has the power to open a preliminary inquiry and to refer the case to the competent judicial authority, namely the investigating magistrate (*juge d'instruction*). The author, in having done so, has availed herself of only one of three remedies which Algerian law provides for in such circumstances.

4.2 The author could have referred the case directly to the investigating magistrate of the Tribunal of Constantine, had the Director of Public Prosecutions failed to act (the latter has a discretion as to whether or not to pursue any matter before it).[3] This direct referral is provided for in articles 72[4] and 73[5] of the Criminal Procedure Code, and would have resulted in the initiation of a public action (*action publique*). Further, any decisions of the investigating magistrate pursuant to those articles may be appealed to the Indictment Division (*Chambre d'accusation*).[6]

4.3 Further, the author could have lodged an action founded on tort against the State party (*contentieux relatif à la responsabilité civile de l'Etat*)[7] which grants victims the right, independently of any decision in the criminal action, to submit a case to the competent administrative authorities and obtain damages and interest. The State party concludes that the most relevant domestic remedies have not been exhausted, that these remedies are frequently used, and lead to satisfactory results.

4.4 Subsidiarily, the State party submits some information on the merits of the case. Mr. Saker was arrested in June 1994 by the judicial police of the Wilaya of Constantine, on suspicion that he was a member of a terrorist group which had perpetrated a number of attacks in the region. After he had been heard, and as it had not been possible to confirm that he belonged to the terrorist group, the judicial police released him from custody and transferred him to the military branch of the judicial police for further questioning. Mr. Saker was released after one day by the military branch of the judicial police. He is wanted in connection with an arrest warrant issued by the investigating magistrate of Constantine, in an investigation against 23 persons, including Mr. Saker, who all allegedly belong to a terrorist group. This arrest warrant remains valid as Mr. Saker is a fugitive. A judgement in absentia was rendered against him and his co-accused on 29 July 1995 by the criminal division of the Court of Constantine.

5.1 By letter of 22 April 2002, counsel contends that the requirement to exhaust domestic remedies has been fulfilled.

5.2 Further to the petition lodged by the author on 20 January 1996, the author was summoned on 20 March 1999 by the investigating magistrate of the 3rd chamber of the Tribunal of Constantine. During the hearing with the judge, she was informed that the matter of the disappearance of her husband had been registered (case No. 32/134) and was being investigated. The judge proceeded to question her as to the circumstances of Mr. Saker's arrest. Since that day the public action (*action publique*) has been pending. According to the author, the opening of this investigation precludes her from using the procedure highlighted by the State party and provided for in articles 72 and 73 of the Criminal Procedure Code.

5.3 Further, the author is precluded from lodging an action founded on tort against the State party until the criminal judge rules on the petition against the security services of the Wilaya of Constantine: the Criminal Procedure Code states that civil actions are stayed until a decision is reached in the public action.[8] In any event, the author claims that the referral of the matter to an administrative body, when the matter is principally criminal in nature (in this instance punishable by the Criminal Procedure Code (art. 113, para. 2)), is inappropriate.

5.4 Some of the other bodies which the author appealed to have judicial powers, including the Minister of Justice who can request that the Director of Public Prosecutions initiate an action or instruct the competent authority to do so,[9] whereas other bodies are mandated to investigate and search for the truth. These include the Ombudsman and the National Observatory for Human Rights. As none of these bodies replied, the author concludes that domestic remedies were neither adequate nor effective. The author recalls that she waited for 19 months after her hearing with the investigating magistrate for any information on the petition which she had lodged almost five years earlier.

5.5 The author contends that certain elements submitted by the State party confirm the arbitrary nature of Mr. Saker's detention and the unlawfulness of the warrant against him. His conviction was handed down in secret (no member of his family was informed of the trial or of the judgement of the court) on 29 July 1995 by the Court of Constantine. Further, the State party has not clarified the date, time or place when Mr. Saker was allegedly released from detention.

5.6 The author highlights that the issue of disappearances and prolonged secret detentions in Algeria are of great concern to human rights activists. The author also refers to the Committee's concluding observations on Algeria during the consideration of the State party's second periodic report. The Committee had urged the State party to ensure that independent mechanisms be set up to investigate all violations of the right to life and security of the person, and that offenders should be brought to justice. The author submits that no such mechanisms have been put into place and that offenders enjoy complete impunity.

Further State party observations and author's comments

6. On 17 November 2003 the State party reiterated that the author has not exhausted domestic remedies, and submitted further information on the merits. Mr. Saker was taken in for questioning on 12 June 1994 by the police. After being held for three days he was handed over to the military branch of the judicial police for further questioning on 15 June 1994. As soon as that questioning ended, Mr. Saker was released. Finally, the judgement of 29 July 1995 pronounced in absentia sentenced Mr. Saker to death.

7. By letter of 5 February 2004 the author refutes the State party's version of events and reiterates her own version. The author also highlights the contents of the letter dated 26 February 1997 from Salim Abdenour (judicial police officer) confirming the date on which Mr. Saker was handed over to the Territorial Centre for further questioning. The author explains that the letter doesn't specify the date of arrest as this would have clearly shown that the length of detention (33 days) had exceeded the legal maximum of 12 days.[10]

Issues and proceedings before the Committee

Admissibility considerations

8.1 Before considering any claim contained in a communication, the Human Rights Committee must, in accordance with rule 93 of its rules of procedure, decide whether or not the communication is admissible under the Optional Protocol to the Covenant.

8.2 The Committee notes that the same matter is not being examined under any other international procedure, in line with the requirements of article 5, paragraph 2 (a), of the Optional Protocol.

8.3 The Committee also notes that the State party maintains that the author has not exhausted available domestic remedies. On this point, the Committee takes note of the author's claim that her complaint lodged on 20 January 1996 remains under consideration, and that this exempts her from exhausting the civil party remedies highlighted by the State party. The Committee considers that the application of domestic remedies has been unduly prolonged in relation to the complaint introduced on 20 January 1996. It has not been demonstrated by the State party that the other remedies it refers to are or would be effective, in light of the serious and grave nature of the allegation, and the repeated attempts made by the author to elucidate the whereabouts of her husband. Therefore, the Committee considers that the author exhausted domestic remedies in conformity with article 5, paragraph 2 (b), of the Optional Protocol.

8.4 As to the alleged violation of article 14, paragraph 3, the Committee considers that the author's allegations have been insufficiently substantiated for purposes of admissibility. On the question of the complaints under articles 2, paragraph 3; 6, paragraph 1; 7; 9 and 10, the Committee considers that these allegations have been sufficiently substantiated. The Committee therefore concludes that the communication is admissible under articles 2, paragraph 3; 6, paragraph 1; 7; 9 and 10, of the Covenant and proceeds to their consideration on the merits.

Consideration of the merits

9.1 The Human Rights Committee has considered the present communication in the light of all the information made available to it by the parties, as provided for in article 5, paragraph 1 of the Optional Protocol.

9.2 The Committee recalls the definition of enforced disappearance in article 7, paragraph 2 (i), of the Rome Statute of the International Criminal Court: Enforced disappearance of persons means the arrest, detention or abduction of persons by, or with the authorization, support or acquiescence of, a State or a political organization, followed by a refusal to acknowledge that deprivation of freedom or to give information on the fate or whereabouts of those persons, with the intention of removing them from the protection of the law for a prolonged period of time. Any act of such disappearance constitutes a violation of many of the rights enshrined in the Covenant, including the right to liberty and security of the person (art. 9), the right not to be subjected to torture or to cruel, inhuman or degrading treatment or punishment (art. 7), and the right of all persons deprived of their liberty to be treated with humanity and with respect for the inherent dignity of the human person (art. 10). It also violates or constitutes a grave threat to the right to life (art. 6).

9.3 With regard to the author's claim of the disappearance of her husband, the Committee notes that the author and the State party have submitted different accounts, dates and outcome of events. While the author contends that her husband was arrested without a warrant on 29 May 1994, and according to a letter from the judicial police (referring to decision No. 16536/96 of the Director of Public Prosecutions of the Tribunal of Constantine) he was handed over to the Territorial Centre on 3 July 1994, the State party contends that Mr. Saker was arrested on 12 June 1994, handed over to the military branch of the judicial police on 15 June 1994, and released some time thereafter. The Committee also recalls that according to the National Observatory for Human Rights, the author's husband was "kidnapped" by an unidentified military group, this according to information received from the security forces. The Committee notes that the State party has not responded to the sufficiently detailed allegations exposed by the author, nor submitted any evidence such as arrest warrants, release papers, records of interrogation or detention.

9.4 The Committee has consistently maintained[11] that the burden of proof cannot rest alone on the author of the communication, especially considering that the author and the State party do not always have equal access to the evidence and that frequently the State party alone has access to the relevant information. It is implicit in article 4, paragraph 2, of the Optional Protocol that the State party has the duty to investigate in good faith all allegations of violation of the Covenant made against it and its authorities and to furnish to the Committee the information available to it. In cases where the allegations are corroborated by evidence submitted by the author and where further clarification of the cases depends on information exclusively in the hands of the State party, the Committee may consider the author's allegations as substantiated in the absence of satisfactory evidence and explanation to the contrary submitted by the State party.

9.5 As to the alleged violation of article 9, paragraph 1, the evidence before the Committee reveals that Mr. Saker was removed from his home by State agents. The State party has not addressed the author's claims that her husband's arrest was made in the absence of a warrant. It has failed to indicate the legal basis on which the author's husband was subsequently transferred to military custody. It has failed to document its assertion that he was subsequently released, even less how he was released with conditions of safety. All these considerations lead the Committee to conclude that the detention as a whole was arbitrary, nor has the State party adduced evidence that the detention of Mr. Saker was not arbitrary or illegal. The Committee concludes that, in the circumstances, there has been a violation of article 9, paragraph 1.[12]

9.6 As to the alleged violation of article 9, paragraph 3, the Committee recalls that the right to be brought "promptly" before a judicial authority implies that delays must not exceed a few days, and that incommunicado detention as such may violate article 9, paragraph 3.[13] It takes note of the author's argument that her husband was held incommunicado for 33 days by the judicial police before being transferred to the Territorial Centre on 3 July 1994, without any possibility of access to a lawyer during that period. It concludes that the facts before it disclose a violation of article 9, paragraph 3.

9.7 As to the alleged violation of article 9, paragraph 4, the Committee recalls that the author's husband had no access to counsel during his incommunicado detention, which prevented him from challenging the lawfulness of his detention during that period. In the absence of any pertinent information on this point from the State party, the Committee finds that Mr. Saker's right to judicial review of the lawfulness of his detention (art. 9, para. 4) has also been violated.

9.8 The Committee notes that while not specifically invoked by the author, the communication appears to raise issues under article 7 of the Covenant in relation to the author and her husband. The Committee recognizes the degree of suffering involved in being held indefinitely without contact with the outside world. In this context, the Committee recalls its general comment No. 20 (44) on article 7 of the Covenant, which recommends that States parties should make provision against incommunicado detention. In the circumstances, the Committee concludes that the disappearance of the author's husband and the prevention of contact with his family and with the outside world constitute a violation of article 7 of the Covenant.[14] The Committee also notes the anguish and stress caused to the author by the disappearance of her husband and the continued uncertainty concerning his fate and whereabouts. The Committee is therefore of the opinion that the facts before it reveal a violation of article 7 of the Covenant with regard to the author's husband as well as the author[15] herself.

9.9 In light of the above findings, the Committee does not consider it necessary to address the author's claims under article 10 of the Covenant.

9.10 As to the alleged violation of article 6, paragraph 1, of the Covenant, the Committee notes that according to the letter from the judicial police (referring to decision No. 16536/96 of the Director of Public Prosecutions of the Tribunal of Constantine), the author's husband was handed to government agents on 3 July 1994, and that the author has not heard from her husband since then. The Committee also notes that the author understood the letter from the National Observatory for Human Rights as informing her of his death.

9.11 The Committee refers to its general comment No. 6 (16) concerning article 6 of the Covenant, which provides inter alia that States parties should take specific and effective measures to prevent the disappearance of individuals and establish facilities and procedures to investigate thoroughly, by an appropriate impartial body, cases of missing and disappeared persons in circumstances which may involve a violation of the right to life.[16] In the present case, the Committee notes that the State party does not deny that the author's husband has been unaccounted for since at least 29 July 1995, when the judgement in absentia was handed down by the criminal division of the Court of Constantine. As the State party has not provided any information or evidence relating to the victim's release from the Territorial Centre, the Committee is of the opinion that the facts before it reveal a violation of article 6, paragraph 1, in that the State party failed to protect the life of Mr. Saker.

9.12 The author has invoked article 2, paragraph 3, of the Covenant, which requires that in addition to effective protection of Covenant rights States parties must ensure that individuals also have accessible, effective and enforceable remedies to vindicate those rights. The Committee attaches importance to States parties establishing appropriate judicial and administrative mechanism for addressing claims of rights violations under domestic law. It refers to its general comment No. 31 (80) on the nature of the general legal obligation imposed on States parties to the Covenant, which provides inter alia that a failure by a State party to investigate allegations of violations could in and of itself give rise to a separate breach of the Covenant.[17] In the present case, the information before the Committee indicates that the author did not have access to such effective remedies, and concludes that the facts before it disclose a violation of article 2, paragraph 3, of the Covenant in conjunction with articles 6, paragraph 1, 7 and 9.

10. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts before it reveal violations by the State party of articles 6, paragraph 1, 7 and 9, paragraphs 1, 3 and 4, of the Covenant in relation to the author's husband as well as article 7 in relation to the author, violations in conjunction with article 2, paragraph 3, of the Covenant.

11. In accordance with article 2, paragraph 3, of the Covenant, the State party is under an obligation to provide the author with an effective remedy, including a thorough and effective investigation into the disappearance and fate of the author's husband, his immediate release if he is still alive, adequate information resulting from its investigation transmitted to the author, and appropriate levels of compensation for the violations suffered by the author's husband, the author and the family. The State party is also under a duty to prosecute criminally, try and punish those held responsible for such violations. The State party is also under an obligation to take measures to prevent similar violations in the future.

12. Bearing in mind that, by becoming a party to the Optional Protocol, the State party has recognized the competence of the Committee to determine whether there has been a violation of the Covenant or not and that, pursuant to article 2 of the Covenant, that State party has undertaken to ensure all individuals within its territory and subject to its jurisdiction the rights recognized in the Covenant and to provide an effective and enforceable remedy in case a violation has been established, the Committee wishes to receive from the State party, within 90 days, information about the measures taken to give effect to the Committee's Views. The State party is also requested to publish the Committee's Views.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the Committee's annual report to the General Assembly.]

Notes

[1] Article 22 of the law of 30 September 1992 relating to the fight against terrorism.

[2] Article 21, para. 3, of the Criminal Procedure Code.

[3] Article 36, para. 1, of the Criminal Procedure Code.

[4] Article 72 of the Criminal Procedure Code: "Toute personne qui se prétend lésée par une infraction, peut, en portant plainte, se constituer partie civile devant le juge d'instruction compétent."

[5] Article 73 of the Criminal Procedure Code: "Le juge d'instruction ordonne communication de la plainte au Procureur de la République, dans un délai de cinq jours, aux fins de réquisitions.

Le Procureur de la République doit prendre des réquisitions dans les cinq jours de la communication. Le réquisitoire peut être pris contre personne dénommée ou non dénommée. Le Procureur de la République ne peut saisir le juge d'instruction de réquisition de non informé, que si, pour des causes affectant l'action publique elle-même, les faits ne peuvent légalement comporter une poursuite, ou si, à supposer ces faits démontrés, ils ne peuvent admettre aucune qualification pénale. Dans le cas où le juge d'instruction passe outre, il doit statuer par une ordonnance motivée. En cas de plainte insuffisamment motivée ou insuffisamment justifiée, le juge d'instruction peut aussi être saisi de réquisitoires tendant à ce qu'il soit provisoirement informé contre toutes personnes que l'information fera connaître. Dans ce cas, celui ou ceux qui se trouvent visés par la plainte peuvent être entendus comme témoins par le juge d'instruction, sous réserve des dispositions de l'article 89 dont il devra leur donner connaissance, jusqu'au moment où pourront intervenir les inculpations ou, s'il y a lieu, de nouvelles réquisitions contre personnes dénommées."

[6] Articles 170 to 174 of the Criminal Procedure Code.

[7] Article 7 of the Civil Procedure Code.

[8] Article 4, para. 2, of the Criminal Procedure Code: "tant qu'il n'a pas été prononcé définitivement sur l'action publique lorsque celle-ci a été mise en mouvement".

[9] Article 30, para. 2, of the Criminal Procedure Code: "d'engager ou de faire engager des poursuites ou de saisir la juridiction compétente de telles réquisitions écrites qu'il juge opportunes".

[10] Article 51, para. 3, of the Criminal Procedure Code.

[11] Communication No. 146/1983, *Baboeram-Adhin and others v. Suriname*, Views adopted on 4 April 1985, para. 14.2; communication No. 139/1983, *Conteris v. Uruguay*, Views adopted on 17 July 1985, para. 7.2; communication No. 202/1986, *Graciela Ato del Avellanal v. Peru*, Views adopted on 31 October 1988, para. 9.2; communication No. 30/1978, *Bleier v. Uruguay*, Views adopted on 29 March 1982, para. 13.3.

[12] Communication No. 778/1997, *Coronel et al. v. Colombia*, Views adopted on 24 October 2002, para. 9.4; communication No. 449/1991, *Barbarín Mojica v. Dominican Republic*, Views adopted on 10 August 1994, para. 5.4.

[13] Communication No. 1128/2002, *Rafael Marques de Morais v. Angola*, Views adopted on 29 March 2005, para. 6.3. See also general comment No. 8 (16), para. 2.

[14] Communication No. 540/1993, *Celis Laureano v. Peru*, Views adopted on 25 March 1996, para. 8.5; communication No. 458/1991, *Mukong v. Cameroon*, Views adopted on 24 July 1994, para. 9.4; communication No. 440/1990, *El-Megreisi v. Libyan Arab Jamahiriya*, Views adopted on 23 March 1994, para. 5.

[15] Communication No. 107/1981, *Quinteros v. Uruguay*, Views adopted on 21 July 1983, para. 14; communication No. 950/2000, *Sarma v. Sri Lanka*, Views adopted on 31 July 2003, para. 9.5.

[16] General comment No. 6 (16), para. 4; communication No. 540/1993, *Celis Laureano v. Peru*, Views adopted on 16 April 1996, para. 8.3; communication No. 563/1993, *Federico Andreu v. Colombia*, Views adopted on 13 November 1995, para. 8.3; communication No. 449/1991, *Barbarín Mojica v. Dominican Republic*, Views adopted on 10 August 1994, para. 5.5.

[17] General comment No. 31 (80), para. 15.

J. Communication No. 1009/2001, *Shchetko v. Belarus* (Views adopted on 11 July 2006, eighty-seventh session)*

Submitted by:	Vladimir Viktorovich Shchetko and his son Vladimir Vladimirovich Shchetko (not represented by counsel)
Alleged victims:	The authors
State party:	Belarus
Date of communication:	14 August 2001 (initial submission)
Subject matter:	Administrative sanction for call for boycott of elections
Procedural issues:	None
Substantive issues:	Permissible restrictions on right to freedom of expression
Articles of the Covenant:	19, paragraphs 2 and 3; 25
Article of the Optional Protocol:	5, paragraphs 2 (a) and (b)

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 11 July 2006,

Having concluded its consideration of communication No. 1009/2001, submitted to the Human Rights Committee by Vladimir Viktorovich Shchetko and Vladimir Vladimirovich Shchetko under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the authors of the communication, and the State party,

Adopts the following:

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* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Nisuke Ando, Mr. Alfredo Castillero Hoyos, Ms. Christine Chanet, Mr. Edwin Johnson, Mr. Walter Kälin, Mr. Ahmed Tawfik Khalil, Mr. Rajsoomer Lallah, Ms. Elisabeth Palm, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Ivan Shearer, Mr. Hipólito Solari-Yrigoyen and Mr. Roman Wieruszewski.

Views under article 5, paragraph 4, of the Optional Protocol

1. The authors are Vladimir Viktorovich Shchetko and his son, Vladimir Vladimirovich Shchetko, Belarusian nationals born in 1952 and 1979, respectively. Although they do not invoke specific provisions of the Covenant, their communication appears to raise issues under article 19 thereof.[1] The authors are unrepresented.

Factual background

2.1 By decision of 27 October 2000 of the Pervomay District Court in Bobruisk, the authors were fined 10000 Belarusian roubles each. This administrative sanction was imposed on them since, on 12 October 2000, they had distributed leaflets calling for the boycott of the Parliamentary elections planned for 15 October 2000. The court based its decision on the provisions of article 167-3 of the Administrative Offences Code (hereafter *AOC*).

2.2 The authors note that article 167-3 *AOC* prohibits public calls for the boycott of elections (in its 1994 version under which they were fined). According to them, this provision cannot be read separately from paragraph 45, part 13, of the Electoral Code (*EC*, version of 1 February 2000) which prohibits campaigning (including calls for boycott of elections, referenda) during election day only. The authors further note that on 9 October 2000, article 167-3 of the *AOC* was amended by law, to bring it into line with the requirements of paragraph 45, *EC*.

2.3 On an unspecified date, the authors appealed the decision of the Court of 27 October 2000 to the Mogilievsk Regional Court. On 29 December 2000, they received a reply signed by the Court's President, which confirmed the District Court's decision. On an unspecified later date, they filed a request for a protest motion (*nadzornaya zhaloba*), under a supervisory procedure, to the Supreme Court. (Under this procedure, individuals may appeal to the President of the Supreme Court or his/her deputies, or to the Prosecutor General or his/her deputies, requesting them to introduce a protest motion to the Court to re-examine the case. If granted, the re-examination would only be on issues of law). On 16 March 2001, the Deputy President of the Supreme Court rejected their claim, thereby upholding the lower courts' decisions.

The complaint

3. Although the authors do not invoke specific provisions of the Covenant, their communication appears to raise issues under article 19 of the Covenant.

State party's observations and author's comments

4. The State party presented its comments on 18 December 2001. It recalls that on 12 October 2000, the authors distributed leaflets that included a call to boycott the Parliamentary elections. Article 167-3 of the *AOC* in its version of 1994 then in force prohibited calls for the boycott of elections at any time. The amendment of 9 October 2000 referred to by the authors only entered into force one month after its official publication (18 October 2000) in the Official Gazette. The State party thus concludes that the authors' fine was entirely lawful and justified.

5. The authors have presented their comments on 16 June 2006.[2] They reiterate that they were fined for distributing "literature" which called for the boycott of the forthcoming elections. They contend that in fact they distributed an issue of the paper "Worker", which was registered as an official periodical. Notwithstanding, they were fined and copies of other issues of the paper in their possession were confiscated. These copies were returned to them after the elections.

Issues and proceedings before the Committee

Admissibility considerations

6.1 Before considering any claim contained in a communication, the Human Rights Committee must, in accordance with rule 93 of its rules of procedure, decide whether or not the communication is admissible under the Optional Protocol to the Covenant.

6.2 The Committee notes that the same matter is not being examined under another international procedure of investigation or settlement, and that domestic remedies have been exhausted. The requirements of article 5, paragraph 2 (a) and (b), of the Optional Protocol, have therefore been met.

6.3 The Committee considers that the present communication may raise issues under article 19 of the Covenant, and that the authors' claim is sufficiently substantiated, for purposes of admissibility. Accordingly, it proceeds to its consideration of the case on the merits.

Consideration of the merits

7.1 The Human Rights Committee has considered the present communication in the light of all the information made available to it by the parties, as provided in article 5, paragraph 1, of the Optional Protocol.

7.2 The authors claim that the State party violated their rights by fining them, solely for having distributed leaflets that contained a call for boycott of a general election. The State party has objected that the fine imposed on the authors was lawful and pronounced in accordance with article 167-3 of the Administrative Offences Code.

7.3 The Committee recalls, first, that right to freedom of expression is not absolute and that its enjoyment may be subject to limitations.[3] However, pursuant to article 19, paragraph 3, only such limitations are permissible as are provided for by law and that are necessary (a) for respect of the rights or reputations of others; (b) for the protection of national security or of public order (*ordre public*), or of public health or morals. The Committee reiterates in this context that the right to freedom of expression is of paramount importance in any democratic society, and that any restrictions on its exercise must meet strict tests of justification.

7.4 The Committee recalls that under article 25 (b), every citizen has the right to vote, and that in order to protect this right, States parties to the Covenant should prohibit any intimidation or coercion of voters by criminal laws and that such laws should be strictly enforced.[4] The application of such laws constitutes, in principle, a lawful limitation of the right to freedom of expression, necessary for the respect of the rights of others. Any situation in which voters are subject to intimidation and coercion must, however, be distinguished from a situation in which voters are encouraged to boycott an election without any form of intimidation.

7.5 In the present case, the State party has merely argued that the restrictions of the authors' rights were provided for under law, without presenting any justification whatsoever for these restrictions. The law in question was amended shortly after the court handed down its judgement in the authors' case, which tends to underline the lack of reasonable justification for the restrictions set out in the above law. The materials before the Committee do not reveal that the authors' acts in any way affected the possibility of voters freely to decide whether or not to participate in the general election in question. In the absence of any other pertinent information, the Committee considers that in the circumstances of the case, the fine imposed on the authors was not justified under any of the criteria set out in article 19, paragraph 3. It therefore concludes that the authors' rights under article 19, paragraph 2, of the Covenant, have been violated.[5]

8. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the Covenant, is of the view that the facts before it disclose a violation of article 19, paragraph 2, of the Covenant.

9. In accordance with article 2, paragraph 3 (a), of the Covenant, the State party is under an obligation to provide Messrs Shchetko with an effective remedy, including compensation amounting to a sum not less than the actual value of the fine and any legal costs paid by the authors. The State party is under an obligation to take measures to prevent similar violations in the future.

10. Bearing in mind that, by becoming a party to the Optional Protocol, the State party has recognized the competence of the Committee to determine whether there has been a violation of the Covenant or not and that, pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory or subject to its jurisdiction the rights recognized in the Covenant and to provide an effective remedy in case a violation has been established, the Committee wishes to receive from the State party, within 90 days, information about the measures taken to give effect to the Committee's Views.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the Committee's annual report to the General Assembly.]

Notes

[1] The Optional Protocol entered into force for the State party on 30 December 1992.

[2] The authors were requested to present their comments in January 2002, 2 December 2003, 17 June 2005, and 10 May 2006. They have provided comments only on 16 June 2006. It transpired that they have left Belarus and have obtained political asylum in a European Union country, which explains the difficulties in the communication with the authors.

[3] See also, communication No. 574/1994, *Kim v. the Republic of Korea*, Views of 3 November 1998 and communication No. 628/1995, *Park v. the Republic of Korea*, Views of 20 October 1998, communication No. 780/1997, *Vladimir Laptsevich v. Belarus*, Views adopted on 20 March 2000, para. 8.2; *Leonid Svetik v. Belarus*, communication No. 927/2000, Views adopted on 8 July 2004, para. 7.2; *Vladimir Velichkin v. Belarus*, communication No. 1022/2001, Views adopted on 20 October 2005, para. 7.3.

[4] General comment No. 25 (1996), para. 11.

[5] See also *Svetik v. Belarus*, communication No. 907/2000, Views adopted on 8 July 2004, para. 7.3.

K. Communication No. 1010/2001, *Lassaad v. Belgium*
(Views adopted on 17 March 2006, eighty-sixth session)*

Submitted by:	Lassâad Aouf (not represented by counsel)
Alleged victim:	The author
State party:	Belgium
Date of communication:	22 May 2001 (initial submission)
Subject matter:	Prosecution of complainant for fraud and embezzlement
Procedural issues:	Exhaustion of domestic remedies
Substantive issues:	Fairness of proceedings - minimum guarantees of defence
Articles of the Covenant:	14, paragraphs 1, 2, 3 (b), (c), (d) and (g)
Articles of the Optional Protocol:	2 and 5, paragraphs 2 (a) and (b)

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 17 March 2006,

Having concluded its consideration of communication No. 1010/2001 submitted by Lassâad Aouf under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the author of the communication, and the State party,

Adopts the following:

Views under article 5, paragraph 4, of the Optional Protocol

1. The author is Mr. Lassâad Aouf, who was born in Tunisia and lives in Belgium. He claims to be a victim of violations by Belgium of articles 14, paragraphs 1, 2 and 3 (b), (c), (e)

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* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Nisuke Ando, Mr. Prafullachandra Natwarlal Bhagwati, Ms. Christine Chanet, Mr. Maurice Glèlè Ahanhanzo, Mr. Edwin Johnson, Mr. Walter Kälin, Mr. Ahmed Tawfik Khalil, Mr. Michael O'Flaherty, Ms. Elisabeth Palm, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Ivan Shearer, Mr. Hipólito Solari-Yrigoyen, Ms. Ruth Wedgwood and Mr. Roman Wieruszewski.

and (g), of the International Covenant on Civil and Political Rights. The author is not represented by counsel. The Covenant and its Optional Protocol came into force for Belgium on 17 August 1984.

Factual background

2.1 After working for S.A. Leisure Investments (subsequently S.A. Tiercé Franco-Belge), on 31 March 1991 the author concluded an agreement with the company to manage a betting shop in Brussels as a self-employed agent. This agreement took effect from 1 April 1991 and stipulated a six-month probationary period (ending 1 October 1991). The author's commission was fixed at 5 per cent of the taxable turnover. The author contracted to accept and record bets on televised races broadcast direct from the United Kingdom.

2.2 In September 1991, S.A. Leisure Investments noted an increase in the turnover of the betting shop managed by the author and a net increase in the number of winning bets registered by that concern. On 26 September 1991 the company's financial controller seized the contents of the cash register and ejected the author. On 3 October 1991 the company sent Mr. Aouf notice of dismissal for gross misconduct, first, for arranging for his own benefit illicit bets worth 2,867,000 Belgian francs (BF), and second, for refusing to reimburse the cash balance in the amount of BF 130,000 to the financial controller on 26 September 1991. The author claims that this was all a plot designed to terminate his contract without compensation for loss of employment.

2.3 On 15 October 1991, Tiercé Franco-Belge sued for damages in criminal proceedings. Pursuant to a complaint filed by the author with Liège Commercial Court, an expert was appointed to rule on the authenticity of the disputed betting slips.

2.4 On 25 June 1998 Brussels Criminal Court sentenced the author to one year's imprisonment suspended for five years, and a fine, and ordered him to pay BF 250,000 to the party claiming damages. The Court of Appeal, by judgement of 10 November 1999, reduced the sentence to six months and increased the amount payable to the party seeking damages to BF 450,000. On 15 March 2000, the Court of Cassation rejected the author's application for judicial review of the case.

The complaint

3.1 The author maintains his innocence and is of the view that the Belgian authorities committed violations during the investigation and the trial.

3.2 Concerning the preparation of the case on the two charges preferred - (a) illicit betting and (b) embezzlement of the cash balance - the author claims that the investigation was vitiated by a number of omissions, first and foremost the failure to examine key witnesses despite the requests of the investigating judge; the carrying out of investigative actions that were not asked for by the investigating judge; and the want of evidence. He believes that the inquiry led by the judicial police officer was a malicious prosecution. Despite petitions lodged by himself, the investigating judge and the public prosecutor's office, the judges who ruled on the case and the Minister of Justice failed to address these deficiencies, thereby demonstrating their lack of impartiality.

3.3 The author claims that he has been denied the guarantees to which any person accused of a criminal offence is entitled. First of all, his counsel's request for an adjournment of the trial date was not accepted by the judge's chambers of the trial court, and second, he was unable to file pleadings with Brussels Criminal Court owing to the court's refusal to consider requests to examine witnesses, thus contravening article 14, paragraph 3 (b), of the Covenant. The judges who ruled on the case, including the investigators and Brussels Criminal Court, resisted these requests to hear witnesses, and their refusal was upheld by the Court of Appeal and the Court of Cassation, thereby contravening article 14, paragraph 3 (e). As to the violation of article 14, paragraph 3 (g), the presiding criminal court judge rebuked him in an attempt to compel him to testify against himself. He is of the view that the courts were biased, that the charges against him were predetermined, and that the judges interpreted the facts in a manner unfavourable to his case, contrary to article 14, paragraphs 1 and 2, of the Covenant.

3.4 The author believes that, from the start of the investigation through to the trial, the judicial police officer, the expert appointed by the commercial court and the judges "acted exclusively in the interests of Tiercé Franco-Belge", in violation of article 14, paragraph 1, of the Covenant.

3.5 The author complains of the excessive delay in bringing his case to trial, i.e. between the bringing of criminal indemnification proceedings (3 October 1991) and the criminal court judgement (25 June 1998), which constitutes a violation of article 14, paragraph 3 (c).

State party's admissibility submission

4.1 In its submission of 5 November 2001, the State party disputes the admissibility of the communication, citing the following clarifications and corrections.

4.2 From 4 April 1991 onwards, S.A. Leisure Investments notified the author on several occasions of "shortfalls" in his cash register and drew his attention to various breaches of regulations. In September 1991, Leisure Investments noted an increase in the turnover of the betting shop managed by the author and a net increase in the number of winning bets registered by that concern. On 26 September 1991 it sent representatives to carry out an audit of the betting shop, in the course of which the author absconded. According to Leisure Investments it emerged that, pursuant to an audit of the bets registered, between 8 June and 26 September 1991, 167 betting slips had been accepted by the author after the deadline for placing bets and that many of these slips had been filled in by the author himself, thereby giving rise to fraudulent winnings. Leisure Investments filed a complaint and sued for damages in criminal proceedings on 15 October 1991.

4.3 As to the alleged delays and the failure to observe due process before the domestic courts, the following points should be noted:

Judge's chambers: By its order of 8 April 1997, the chamber held that the charges were sufficient to warrant the author's committal for trial before the criminal court on the count of fraud and embezzlement.

Criminal court: The criminal court sentenced the author on 25 June 1998 to one year's imprisonment, suspended, holding that, notwithstanding issues of reliability involving the system devised by S.A. Tiercé Franco-Belge, the case file clearly showed that the author had engaged in fraudulent practices to breach the trust of the party claiming damages.

Court of Appeal: On 10 November 1999 the Twelfth Division of the Brussels Court of Appeal upheld the judgement but reduced the term of imprisonment to six months and awarded the party claiming damages €11,155.21. The court held that the additional investigative measures requested of the court by the author were of no relevance in ascertaining the truth, and the measures taken during the preliminary investigation were sufficient to enlighten the court. It held, inter alia, that the investigations undertaken by the party claiming damages, the expert and the investigators were based on a sufficiently broad sample of similar concerns, and that the author's allegation that the party claiming damages had sought to avoid compensating him for loss of employment was unfounded.

Court of Cassation: By its judgement of 15 March 2000, the Court rejected the author's application for judicial review on the grounds that the appeal judges had noted the existence of serious, precise and corroborative circumstantial evidence that the author had knowingly accepted racing bets once the races were under way. Accordingly, the Court noted that the point raised was inadmissible insofar as, while not challenging the court's jurisdiction, the author was essentially criticizing the conduct of the preliminary investigation.

4.4 With regard to the complaint of the lack of impartiality of the investigating judge and the Brussels public prosecutor's office, the State party, taking an objective approach in line with the jurisprudence of the European Court of Human Rights, maintains that in the present case the investigating judge ordered the investigative actions that he thought necessary given the inconsistencies in the author's story. Therefore, the judge's objective impartiality cannot be questioned. Likewise, proceeding from subjective criteria, the State party believes it is obvious that the author's submissions are largely insufficient to challenge the presumption of impartiality.

4.5 In addition, the State party stresses that in the application for judicial review, the author failed to mention the alleged violation of article 14 of the Covenant that he had cited before the Brussels Court of Appeal, whence the inadmissibility of the present complaint on the grounds of failure to exhaust domestic remedies.

4.6 Moreover, the Court of Cassation noted that, in order to ascertain whether an individual has been given a fair hearing within the meaning of article 6.1 of the European Convention on Human Rights, it must be ascertained whether the case, considered as a whole, has been tried fairly, and that, since the author was given ample opportunity to refute the charges brought against him by the public prosecutor in the national courts, he cannot claim to have been denied a fair trial.

4.7 Lastly, the State party notes that the European Court of Human Rights had considered an application based on the same legal grounds, which it declared inadmissible on 12 January 2001, holding that it disclosed absolutely no violation of the rights and freedoms guaranteed by the Convention or its Protocols.

4.8 In conclusion, given the author's inability to demonstrate that alleged shortcomings in the investigation have seriously compromised the fairness of every aspect of the proceedings before the trial judge, the State party believes that there has been no violation of article 14.

Author's comments on State party submission

5. In his submission of 7 January 2002, the author restates the elements of his complaint. He dwells on the lack of impartiality of members of the Belgian legal service, who are appointed on the basis of political affiliation. He adds that he never had access to the disputed betting slips. He states that only the version of the facts as presented by the party claiming damages, indeed only that of the authorities acting on behalf of Tiercé Franco-Belge, was used in sentencing him. He confirms that the European Court of Human Rights ruled inadmissible a previous complaint submitted by him, but says that the earlier complaint did not include all the elements of his complaint to the Human Rights Committee.

State party's supplementary submission on admissibility and merits

6.1 In its submission of 11 April 2002, the State party continues to maintain that the complaints of violations of article 14, paragraphs 2 and 3 (b), (c) and (g), are inadmissible, and that there are no grounds for the author's petition. It takes the view that the author is basically complaining that he has been found guilty, since he believes that the case file does not contain sufficient evidence to prove his guilt. The State party recalls, with reference to the Committee's jurisprudence, that it is not for the Committee to rule on the author's guilt or innocence. Its role is to establish whether the evidence for or against the author was presented in such a way as to guarantee a fair trial and to ensure that the trial was conducted in such a way as to obtain this outcome. The weighing of evidence by a national judge can only be criticized in exceptional cases, when the national judge has deduced from the facts conclusions that are manifestly unjust and arbitrary. According to the State party, this is not so in the present case, and it cannot be concluded that the right to a fair trial has been violated.

6.2 As to the complaint that witnesses were not heard despite the request of the investigating judge, the State party maintains that, in order to determine whether a trial conforms to the provisions of article 14, it is necessary to consider the proceedings as a whole, not just isolated elements. The record shows that additional investigative actions were requested by the investigating judge, who requested the interrogation of various auditors and technical officers working for S.A. Tiercé Franco-Belge.

6.3 In his communication, the author states that the additional investigative measures concerned charge (b). However, according to the State party, the letter of the investigating judge dated 18 March 1992 is very clear. He requests the interrogation of the above-mentioned witnesses "in order to obtain full technical details of the inspections performed on machines for recording bets on greyhound races placed in various betting shops". The warrant therefore concerned charge (a), not charge (b). The fact that some of these interrogations did not take place therefore has absolutely no bearing on the procedure according to which the author was sentenced under charge (b).

6.4 With regard to the examination of witnesses relevant to charge (a), the State party explains that it should be determined whether the fact that some of these interrogations never took place constitutes a violation of the right to a fair trial. It notes that the author was allowed to petition the trial judge to examine the witnesses. The trial judge took the view that this examination would serve no purpose, since the steps taken during the preliminary investigation were sufficient to enlighten him, namely comparative investigations undertaken by the party claiming damages, the expert and the investigators of a representative sample of betting shops similar to the one managed by the defendant. Moreover, the Court of Appeal proceeded to make exhaustive inquiries which, the State party believes, yielded sufficient proof of the author's guilt.

6.5 It appears from these observations that the investigative measure requested by the investigating judge, and subsequently by the author, namely the interrogation of witnesses in order to obtain full technical details of the inspections performed on machines for recording racing bets, was irrelevant. This is because the author's conviction rests on serious, precise and corroborative circumstantial evidence that he fraudulently accepted racing bets once the races were under way. As to the other investigative measures requested by the author, the Court of Appeal states that they were irrelevant and that the defendant had ample opportunity to refute the evidence before the trial judge and the court.

6.6 The national courts thus acted within their rights in deciding to reject the request to hear witnesses. Article 14, paragraph 3 (e), of the Covenant does not compel the summoning of witnesses; it simply aims to ensure equality of arms. Accordingly, the State party notes that the author was given the opportunity to submit arguments to the trial court, the Court of Appeal and the Court of Cassation regarding the appropriateness of calling witnesses. The fairness of the proceedings was not compromised by the decision not to call witnesses and the State party concludes that no due process violations occurred.

6.7 The State party maintains that this allegation was not raised before the Court of Cassation, so domestic remedies have not been exhausted. Nor, according to the State party, is the complaint well-founded. The author states that, as far as charge (b) is concerned, there is no evidence of his guilt. Yet according to the State party, the Court of Appeal declared charge (b) valid after making exhaustive inquiries.

6.8 The author claims that his prosecution is based on the letters sent to him by the financial and audit director. According to the author, these letters do not prove his guilt. Since the Court of Appeal did not deduce manifestly unjust or arbitrary conclusions from the facts, it cannot be concluded that the presumption of innocence was violated.

6.9 As to the complaint that the author's guilt on charge (a) was not legally established, the State party retorts that the conviction was amply substantiated. The Court of Appeal held that the charge was proven by serious, precise and corroborative circumstantial evidence; considering that article 14 does not prohibit circumstantial evidence, the type of evidence used in the case does not violate the Covenant.

6.10 As to the alleged violation of article 14, paragraph 3 (b), the State party recalls that the author complains that the Brussels judge's chambers refused to adjourn the case, even though the parties had allegedly asked for a postponement. Judge's chambers do not rule on the merits of the charges in a case. It is the responsibility of the trial judge to determine whether the charges are manifested in evidence. For the State party, article 14, paragraph 3 (b), does not apply to proceedings in judge's chambers, which function merely as a committal court. Additionally, the State party recalls that a refusal to adjourn proceedings does not constitute a violation per se of article 14, paragraph 3 (b). In this case, judge's chambers stated that there was no need to defer the case given that the statutory time limits had been respected as regards the timing of proceedings. Moreover, the author had failed to demonstrate in what way his right to adequate time for the preparation of his defence had allegedly been violated.

6.11 The author claims, moreover, that he was not allowed to file pleadings with Brussels Criminal Court. According to the State party, it appears from the author's application that he himself refused to file pleadings, even though he had the opportunity to do so. In these circumstances, a violation of article 14, paragraph 3 (b), cannot be said to have occurred.

6.12 The State party maintains that the alleged violation of article 14, paragraph 3 (c), was not raised before the Court of Cassation, so domestic remedies have not been exhausted, whence the inadmissibility of the complaint. The State party also takes issue with the merits of the complaint. The reasonable period of time begins from the moment charges are laid. In this case, the author was charged in an indictment dated 18 December 1996. The decision to refer the case to judge's chambers was taken on 8 April 1997 and the Court of Appeal judgement dates from 10 November 1999. The Court of Cassation dismissed the application for judicial review on 15 March 2000. Proceedings therefore took place over three years and three months, which is a reasonable period of time according to the State party.

6.13 The State party recalls that the author complains about the comments made by the criminal court in its judgement of 25 June 1998, which apparently disclose a violation of article 14, paragraph 3 (g), but maintains that this complaint was not raised before the Court of Cassation and that domestic remedies have therefore not been exhausted. The State party is also of the view that the complaint is without merit. It notes that the comments in question refer to the sentence handed down by the trial judge. This judgement was set aside by the Court of Appeal, which, in pronouncing sentence, substituted its own reasons. Any violation of article 14, paragraph 3 (g), was therefore rectified at a later stage in proceedings.

Comments by the author

7. In a letter dated 26 June 2002, the author takes issue with the State party's submission. He does admit, however, erroneously stating that the additional investigative measures referred to charge (b), whereas, as the State party points out, they actually referred to charge (a). He believes, moreover, that the Committee should "review the facts", specifically the lack of evidence in the present case. Finally, with regard to the State party's argument that he has not exhausted domestic remedies in connection with the alleged violations of article 14, paragraphs 2 and 3 (b) and (c), the author is of the view that the Court of Cassation should not have restricted itself to the content of his pleading, but had a responsibility to adjudicate on the case as a whole. Regarding the argument that he had failed to exhaust domestic remedies in the matter of his complaint under article 14, paragraph 3 (g), he claims that he did in fact state, in his application to the Court of Cassation, that the presiding judge of Brussels Criminal Court had asked him "to testify against himself".

Issues and proceedings before the Committee

Consideration of admissibility

8.1 Before considering any claim contained in a communication, the Human Rights Committee must, in accordance with rule 93 of its rules of procedure, decide whether or not the complaint is admissible under the Optional Protocol to the Covenant.

8.2 The Committee noted that a similar complaint submitted by the author was declared inadmissible by the European Court of Human Rights on 12 January 2001. However, the provisions of article 5, paragraph 2 (a), of the Optional Protocol did not preclude the Committee from declaring the present communication admissible, since the matter was no longer being examined under another procedure of international investigation or settlement and the State party had entered no reservation in respect of article 5, paragraph 2 (a), of the Optional Protocol.

8.3 With regard to the exhaustion of domestic remedies, the Committee has taken note of the State party's arguments stressing the inadmissibility of the complaints of violations of article 14, paragraphs 2 and 3 (c) and (g), which the author failed to raise before the Court of Cassation, and the violation of article 14, paragraph 3 (b), of which the judges of the Court of Cassation were not apprised. The Committee notes the author's argument, first, that the Court of Cassation should not have limited itself to considering his statement of claim, and second, that his pleading did contain a complaint of a violation of article 14, paragraph 3 (g). Having examined the author's statement of claim to the Court of Cassation, the Committee notes that at no time did the author mention that the presiding judge of Brussels Criminal Court had asked him to testify against himself. Moreover, leaving aside the Court of Cassation, the author's pleadings show that the trial judges were never apprised of an alleged violation of article 14, paragraph 3 (b). Finally, the Committee recalls that while complainants are not required to invoke specifically the provisions of the Covenant which they believe have been violated, they must set out in substance before the national courts the claim which they later bring before the Committee. Since the author did not raise the aforementioned complaints before the Court of Cassation, nor the alleged violation of article 14, paragraph 3 (b), before the trial judges, these parts of the communication are inadmissible under article 5, paragraph 2 (b), of the Optional Protocol.

8.4 Regarding the complaints of violations of article 14, paragraphs 1 and 3 (e), the Committee notes that the State party does not dispute, in its submission of 11 April 2002, the admissibility of these allegations. The Committee therefore declares that this part of the communication is admissible and proceeds with its examination of the merits.

Consideration of the merits

9.1 The Human Rights Committee has considered the present communication in the light of all the information made available to it by the parties, as provided for in article 5 of the Optional Protocol.

9.2 Regarding the complaints of violations of article 14, paragraphs 1 and 3 (e), the Committee has noted the author's arguments stating that several witnesses were not heard contrary to requests made by the investigating judge and/or the author himself. According to the author, the members of the national legal service, specifically the public prosecutor, were biased, as indicated by the fact that investigative measures ordered by the investigating judge were not included in the case file whereas other measures, which he did not request, were included. Insofar as the courts did not sanction these shortcomings or allow the examination of witnesses requested by the author, he is of the view that his case could not be properly defended before an independent tribunal and he was thus convicted on insufficient evidence.

9.3 The Committee has also taken note of the State party's detailed arguments that no violations of the Covenant have occurred. The Committee recalls its jurisprudence under which it is generally a matter for domestic courts to examine the facts and evidence in a particular case. In considering allegations of violations of article 14 in this regard, the Committee may only establish whether the conviction was arbitrary or amounted to a denial of justice. Thus, first of all, regarding the examination of witnesses as part of the consideration of the facts and the gathering of evidence by the national courts, the Committee notes that, in this case, the Court of Appeal, as borne out by its judgement, examined in depth the author's complaints about the hearing of witnesses and explained why it held the complaints to be groundless, considering that such hearings would be of little value in ascertaining the truth. Furthermore, recalling that article 14, paragraph 3 (e), does not provide an unlimited right to call any witness requested by the accused or his counsel, the Committee is of the view that the material before it does not disclose that the judgement of the Court of Appeal, subsequently upheld by the Court of Cassation, was of a nature to compromise the application of the principle of the equality of arms of the prosecution and the defence. Second, the Committee notes no arbitrary conduct or denial of justice. The Committee cannot therefore conclude that members of the national legal service were biased; the refusal to hear witnesses and the charges against the author as a result of an assessment of the facts and the evidence do not bear out this conclusion. The Committee also notes that the author fails to substantiate his assertion that his ethnic origin went against him, and that at no time did he raise this issue in the domestic courts. The Committee therefore concludes that there has been no violation of article 14, paragraphs 1 and 3 (e).

10. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, finds that the facts such as they have been presented do not disclose any violation of the Covenant.

[Adopted in English, French and Spanish, the French text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the Committee's annual report to the General Assembly.]

L. Communication No. 1016/2001, *Hinostroza Solís v. Peru* (Views adopted on 27 March 2006, eighty-sixth session)*

Submitted by:	Rubén Santiago Hinostroza Solís (not represented by counsel)
Alleged victim:	The author
State party:	Peru
Date of communication:	19 July 1999 (initial submission)
Subject matter:	Dismissal of a public servant owing to the restructuring of the organization
Procedural issues:	-
Substantive issues:	Age discrimination
Articles of the Covenant:	25 (c)

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights, acting through its Working Group on Communications,

Meeting on 27 March 2006,

Having concluded its consideration of communication No. 1016/2001, submitted by Mr. Rubén Santiago Hinostroza Solís under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the author of the communication and the State party,

Adopts the following:

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* The following members of the Committee took part in the consideration of the communication: Mr. Abdelfattah Amor, Mr. Nisuke Ando, Mr. Prafullachandra Natwarlal Bhagwati, Ms. Christine Chanet, Mr. Maurice Glèlè-Ahanhanzo, Mr. Edwin Johnson, Mr. Walter Kälin, Mr. Ahmed Tawfik Khalil, Mr. Rajsoomer Lallah, Mr. Michael O'Flaherty, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Ivan Shearer, Mr. Hipólito Solari-Yrigoyen, Ms. Ruth Wedgwood and Mr. Roman Wieruszewski.

An individual opinion signed jointly by Committee members Mr. Michael O'Flaherty, Mr. Walter Kälin, Mr. Edwin Johnson and Mr. Hipólito Solari-Yrigoyen, and a separate opinion signed by Committee members Sir Nigel Rodley, Mr. Ivan Shearer and Ms. Ruth Wedgwood, are appended to the present document.

Views under article 5, paragraph 4, of the Optional Protocol

1.1 The author of the communication, which is dated 19 July 1999, is Rubén Santiago Hinostroza Solís, a Peruvian national, who claims to be a victim of a violation by Peru of article 25 (c) of the Covenant. He is not represented by counsel.

1.2 The Optional Protocol entered into force for Peru on 3 January 1981.

Factual background

2.1 The author worked as a public servant in the National Customs Authority (SUNAD). Supreme Decree No. 043-91-EF of the Executive called for the reorganization of that body, including a reduction in the number of staff. In this connection, the National Customs Authority issued resolution No. 6338 of 5 September 1991 in which it declared a number of its employees redundant and ordered their dismissal on the basis of two criteria: time in service (25 years or more for women and 30 for men) and age (55 or older for women and 60 for men). The author, who was 61 years old and had 11 years of service, was one of those employees.

2.2 On 5 December 1991, the author appealed against the resolution before the National Civil Service Tribunal, alleging that he had been dismissed without any notification and because he was 61 years old, although the legal retirement age for National Customs Authority employees under the Public Service Act was 70. On 19 February 1992, the Tribunal declared that his appeal was unfounded.

2.3 On 5 December 1991, the author submitted a complaint against the aforementioned resolution to the National Civil Service Tribunal, requesting reinstatement in his job. On 19 February 1992, the complaint was declared unfounded.

2.4 The author submitted an administrative claim to the labour division of the Lima High Court of Justice on 26 March 1992. In its judgement of 28 December 1994, the labour division allowed the claim, finding that the author had been dismissed illegally, being under the legal retirement age, and that he had the right to be reinstated in his job.

2.5 On 11 December 1995, the State Procurator lodged an appeal before the Supreme Court. On 21 August 1996, the Supreme Court declared the judgement of the Lima High Court null and void for technical reasons, and ordered that another judgement be issued.

2.6 On 13 October 1997, the Lima High Court again ruled that the appeal was justified and ordered that the author be reinstated in his job. The State again lodged an appeal with the Supreme Court. The judgement of 7 October 1998 upheld the appeal, finding that the National Customs Authority had good reason to dismiss the author, since it was endeavouring to reduce civil service staff, which was "oversized".

2.7 The case has not been submitted to another procedure of international investigation or settlement.

The complaint

3. The author alleges a violation of article 25 (c) of the Covenant, since the National Customs Authority's resolution led to his dismissal without just cause. The resolution violated the principle of the hierarchy of norms, since it was contrary to the provisions of article 35 of Legislative Decree No. 276, the Public Service Act, which establishes 70 as the maximum age for employment in public service. Moreover, article 48 of the 1979 Constitution, which was in force at the time, recognizes the right to security of employment. The author also refers to the excessive length of the procedure, as well as the fact that the judiciary was under investigation by President Fujimori's Special Commission on Reorganization of the Government, which naturally brought the work of the Supreme Court to a standstill.

The State party's observations

4.1 In its observations of 22 April 2002, the State party states that it has no objections to the admissibility of the communication. With regard to the merits, it points out that the Supreme Decree of 8 January 1991, in which the Executive announced the reorganization of all public bodies, including ones in the central government, regional governments, decentralized public institutions, development corporations and special projects, was legally supported by article 211 of the 1979 Constitution and was decided upon in view of overstaffing and with the aim of securing the country's economic stability and financial balance. In this context, the Supreme Decree of 14 March 1991 announced the reorganization of the National Customs Authority in order to improve customs services as part of the process of liberalization of foreign trade. That reorganization plan called, among other things, for the streamlining of personnel, indicating that staff not joining in the voluntary resignation programme would be declared redundant and laid off because of restructuring. The Customs Authority issued resolution 2412 on 4 April 1991, establishing the criteria to be taken into account for announcing the redundancy of employees who had not joined in the voluntary resignation programme, identifying among others staff who had reached the age limit defined in the rules of Decree Law No. 20530 and 19990, i.e. 55 years for women and 60 for men.

4.2 Resolution No. 6338, which declared the author redundant and terminated his employment as of 6 September 1991, was in keeping with the legal framework governing the reorganization of the customs service and respected the principle of the hierarchy of norms, which was: article 211 of the Constitution; Supreme Decree No. 043-91-EF of 14 March 1991 concerning the reorganization of the National Customs Authority; and National Customs Authority resolution No. 002412 of 4 April 1991 establishing the criteria to be used for declaring that the Authority was overstaffed.

4.3 While article 48 of the Constitution, which was invoked by the author, guarantees the right to security of employment, it also points out that a worker can be dismissed for just cause provided in the law and duly proven. In the present case, there was just cause for dismissing the author, since he was terminated due to reorganization.

4.4 The State party declares that it has not violated article 25 (c) of the Covenant, since the author was not deprived of access, on general terms of equality, to public service in his country, as demonstrated by his 11 years of service in a public institution. His dismissal was motivated by objective reasons based on a reorganization of public bodies.

Issues and proceedings before the Committee

Consideration of admissibility

5.1 Before considering any claim contained in a communication, the Human Rights Committee must, in accordance with rule 93 of its rules of procedure, decide whether or not the communication is admissible under the Optional Protocol to the Covenant.

5.2 The Committee has ascertained, as it is required to do under article 5, paragraph 2 (a), of the Optional Protocol, that the same matter has not been submitted to another procedure of international investigation or settlement.

5.3 The Committee notes that the State party indicates that it has no objections to the admissibility of the communication. There being no obstacle in this respect the Committee considers that the communication is admissible and that the issue raised by the author should be considered on the merits.

Consideration of the merits

6.1 The Human Rights Committee has considered the present communication in the light of all the information made available to it by the parties, as provided for in article 5, paragraph 1, of the Optional Protocol.

6.2 The question raised by the author is whether his dismissal from public service for reasons relating to the reorganization of public bodies constitutes a violation of article 25 (c) of the Covenant. Article 25 (c) recognizes for every citizen the right to have access, on general terms of equality, to public service in his country, without any of the distinctions mentioned in article 2, paragraph 1, namely race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. To ensure access on general terms of equality, the criteria and procedures for appointment, promotion, suspension and dismissal must be objective and reasonable.

6.3 The Committee recalls its jurisprudence with respect to article 26,[1] to the effect that not every distinction constitutes discrimination, but that distinctions must be justified on reasonable and objective grounds. While age as such is not mentioned as one of the grounds of discrimination prohibited in article 26, the Committee takes the view that a distinction related to age which is not based on reasonable and objective criteria may amount to discrimination on the ground of "other status" under the clause in question, or to a denial of equal protection of the law within the meaning of the first sentence of article 26. This reasoning also applies to article 25 (c) in conjunction with article 2, paragraph 1, of the Covenant.

6.4 In the present case the Committee notes that the author was not the only public servant who lost his job, but that other employees of the National Customs Authority were also dismissed because of restructuring of that entity. The State party indicates that the restructuring originated from the Supreme Decree of 8 January 1991, wherein the Executive announced a reorganization of all public entities. The criteria for selecting those employees to be dismissed were established following a general implementation plan. The Committee considers that the age limit used in the present case for continued post occupancy was an objective distinguishing criterion and that its implementation in the context of a general plan for the restructuring of the civil service was not unreasonable. Under the circumstances, the Committee considers that the author has not been the subject of a violation of article 25 (c).

7. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts before it do not disclose a violation of article 25 (c) of the Covenant.

[Adopted in English, French and Spanish, the Spanish text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the Committee's annual report to the General Assembly.]

Note

[1] See communication No. 983/2001, *Love v. Australia*, Views adopted on 25 March 2003, para. 8.2.

APPENDIX

Individual opinion of Committee members Mr. Michael O'Flaherty, Mr. Walter Kälin, Mr. Edwin Johnson and Mr. Hipólito Solari-Yrigoyen (dissenting)

1. In the present case, the majority of the Committee concluded that age as such "was an objective distinguishing criterion" and "that its implementation in the context of a general plan for the restructuring of the civil service was not unreasonable" (para. 6.4). In our view this is tantamount to saying that age as such is an objective and reasonable criteria for deciding who would have to leave public service. This reasoning cannot be reconciled with the approach taken by the Committee in the case of *Love v. Australia*. There, the Committee decided that while age as such is not mentioned as one of the enumerated grounds of prohibited discrimination in the second sentence of article 26, a distinction related to age which is not based on reasonable and objective criteria may amount to discrimination on the ground of "other status" under the clause in question. It stressed that while a mandatory retirement age would generally not constitute age discrimination, it still would have the task under article 26 of the Covenant of assessing in the particular case whether any particular arrangement for mandatory retirement age departing from the general retirement age in a given country is discriminatory. As it did in the case of *Love v. Australia*, the Committee should have examined in the present case whether there were reasonable and objective grounds justifying the use of age as a distinguishing criterion. It did not do so and thus departed from the approach taken in the case of *Love v. Australia* in a way that cannot be justified in our view.

2. In the present case, the State party has failed to demonstrate that the aims of the plan to restructure the National Customs Authority were legitimate. In this context, we note that the Committee in particular did not address the claims of the author that both the Constitution and laws adopted by Parliament guaranteed him security of employment and that these guarantees were not removed as a result of a democratic process of amending the relevant provisions but by decree issued by the then President of Peru. Furthermore, the use of the criterion of age as applied to the author is not objective and reasonable for several reasons. First, the case concerns a matter of dismissal and not retirement. Second, while age may justify dismissal in cases where age affects the ability of the person concerned to perform their functions or where the person concerned has worked long enough to have acquired full or at least substantial pension rights, the State party has not shown that in the case of the author who, notwithstanding his age, had been employed for just 11 years, any such reasons were present. It is therefore our view that the author has been the subject of a violation of article 25 (c) of the Covenant.

(*Signed*): Mr. Michael O'Flaherty

(*Signed*): Mr. Walter Kälin

(*Signed*): Mr. Edwin Johnson

(*Signed*): Mr. Hipólito Solari-Yrigoyen

[Done in English, French and Spanish, the English text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the Committee's annual report to the General Assembly.]

Individual opinion of Committee members Sir Nigel Rodley, Mr. Ivan Shearer and Ms. Ruth Wedgwood (concurring)

The Committee has concluded that Peru did not violate the rights of the author under article 25 (c) of the Covenant, even though the Peruvian National Customs Authority dismissed him in a downsizing based in part on his age. This decision was evidently troubling for the Committee in the light of the fact that the State has offered no reason for its discriminatory use of age in lay-offs.

One thing remains clear, however: the Committee's decision in this case should not be understood as supporting Peru's use of gender discrimination in lay-offs and downsizing. The Peruvian National Customs Authority peculiarly requires women to leave public service five years earlier than men, based on age and length of service.

There is no evident reason why women should be forced into retirement at an earlier stage than men, and it is hard to see how, if the issue had been litigated between the parties, such a practice could be regarded as consistent with either article 25 or article 26 of the Covenant.

(*Signed*): Sir Nigel Rodley

(*Signed*): Mr. Ivan Shearer

(*Signed*): Ms. Ruth Wedgwood

[Done in English, French and Spanish, the English text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the Committee's annual report to the General Assembly.]

M. Communication No. 1022/2001, *Velichkin v. Belarus*

(Views adopted on 18 October 2005, eighty-fifth session)*

Submitted by:	Mr. Vladimir Velichkin (not represented by counsel)
Alleged victim:	The author
State party:	Belarus
Date of communication:	9 May 2001 (initial submission)
Subject matter:	Freedom of expression
Procedural issues:	None
Substantive issues:	Restrictions of the right to freedom of expression (freedom to impart information)
Articles of the Covenant:	19, paragraphs 2 and 3
Articles of the Optional Protocol:	None

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 20 October 2005

Having concluded its consideration of communication No. 1022/2001, submitted to the Human Rights Committee by Vladimir Velichkin under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the author of the communication, and the State party,

Adopts the following:

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* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Prafullachandra Natwarlal Bhagwati, Ms. Christine Chanet, Mr. Maurice Glèlè Ahanhanzo, Mr. Edwin Johnson, Mr. Walter Kälin, Mr. Ahmed Tawfik Khalil, Mr. Rajsoomer Lallah, Mr. Michael O'Flaherty, Ms. Elisabeth Palm, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Ivan Shearer, Mr. Hipólito Solari-Yrigoyen, Ms. Ruth Wedgwood and Mr. Roman Wieruszewski.

The text of an individual opinion signed by Committee member Ms. Ruth Wedgwood is appended to the present document.

Views under article 5, paragraph 4, of the Optional Protocol

1. The author of the communication is Mr. Vladimir Velichkin, a Belarusian national born in 1960. He claims to be victim of violations of Belarus of his rights under article 19, paragraph 2, of the Covenant. He is not represented by counsel.

Factual background

2.1 The author claims to be a human rights activist from Brest (Belarus).
On 23 November 2000, he requested the authorization of the Executive Committee of the City of Brest to organize a meeting with 10 participants, to celebrate the 52nd anniversary of the signature of the Universal Declaration of Human Rights (UDHR), on 10 December 2000, near the "Pushkin" Public Library in the Centre of Brest.

2.2 On 4 December 2000, the Chief of the Executive Committee of Brest rejected his request for such a meeting in the centre of Brest, but authorized a meeting at the "Stroitel" Stadium. The Committee based its decision on a previous Executive Committee's decision of 12 October 1998, pursuant to which all meetings had to take place in the Stadium, and that the Stadium was declared to be a "permanent place" for the organization of meetings and assemblies.

2.3 At 11 a.m. on 10 December 2000 (a Sunday), the author stood in front of the CUM (Central Universal Store) in the centre of Brest and began to distribute leaflets of the UDHR, to "remind the citizens of this date and of their rights". Next to him stood four other individuals who carried posters and who also, according to the author, distributed the text of the Declaration. The author contends that he acted in conformity with article 34 of the Belarusian Constitution.[1]

2.4 At around 12.30, a policeman allegedly approached the author, presented himself as a district inspector, and asked him to stop distributing leaflets and to leave. The author refused, invoking article 34 of the Constitution. Shortly afterwards, another man approached him, and after identifying himself as the Chief of the Leninsky District Police Department in Brest, invited the author to stop distributing leaflets. He explained that the author was holding a non-authorized meeting ("picket"), and asked him to leave.

2.5 As the author again refused to leave, a police car arrived and he was asked by the policemen to climb into the car. He obeyed and at around 12.50 he was brought to the Leninsky District Police Department, where he was charged with two administrative offences under articles 166 and 167 of the Administrative Offences Code (breach of the order for organization and conduct of assemblies, meetings, street parades and demonstrations, and insubordination to a lawful instruction or request of a police officer while he executes his duty to protect the public order). He was placed in a temporary detention until 11 a.m. the following day, 11 December 2000, when he was brought to the Leninsky District Court of Brest. According to the author, the examination of his case started at 2 p.m., but due to procedural violations (allegedly, he was not informed of his rights by the police upon arrest), the judge ordered his release and returned the indictment act to the Police Department. According to the author, he was thus unlawfully deprived of liberty for 25 hours.

2.6 On 15 January 2001, the Leninsky District Court of Brest decided to fine the author the equal of 20 minimum monthly salaries (72 000 BLR), on charges of "conduct of a meeting on a place non-authorized by the Brest City Executive Council", in violation of the provisions of article 11, part 1, of the Law on Assemblies, Meetings, Street Processions, Demonstrations and Pickets (Law on Assemblies).

2.7 The author claims that his acts did not constitute an administrative offence. He invokes article 2 of the Law on Assemblies, which gives the definition of picket. Accordingly, a picket constitute "the expression in public, made by a citizen or a group of citizens, of a socio-political, collective, individual or other interests, or the contestation, including by hunger strike, in relation to all type of problems, with or without use of placards, posters or other means". He affirms that on 10 December 2000, he did not express his personal opinions on any issue but simply disseminated 53 copies of the UDHR. According to him, Belarusian law does not provide for any authorization by the authorities in order to disseminate information contained in printed papers having printing identification data, such as the UDHR leaflets he was distributing.

2.8 Mr. Velichkin further explains that as he did not violate the Law on Assemblies, he considers the police requests to have him stop distributing leaflets and to leave the scene to be unlawful. In addition, according to him, article 166 of the Administrative Offences Code engages the responsibility only for insubordination against a lawful police instruction or request.

2.9 On an unspecified date, the author appealed against the decision of the Leninsky District Court of 15 January 2001 to the Brest Regional Court. On 13 February 2001, the Brest Regional Court upheld the District Court's decision to fine the author. The author then appealed to the Supreme Court (on an unspecified date). On 3 April 2001, the Supreme Court rejected his claim.

The complaint

3. The author claims that he is a victim of his right to disseminate information, in violation of article 19, paragraph 2, of the Covenant and article 34 of the Belarusian Constitution.

State party's observations and author's comments

4.1 In a note verbale of 6 February 2002, the State party observes that the Supreme Court of Belarus has proceeded to a verification of the author's case. It recalls that in November 2000, the author had requested an authorization of the Brest Executive Council to organize a meeting near the Public Library, to commemorate the 52nd anniversary of the signature of the UDHR. On 4 December 2000, the Brest City Council authorized the author to organize this meeting in the Stroitel Stadium; this decision was based on a previous decision of the City Council (of 15 December 1998).

4.2 Notwithstanding, on 10 December 2000, in violation of the City administration's decision, Mr. Velichkin unlawfully organized a meeting ("picket") on one of the Brest main streets (prospect Masherova). He refused to comply with numerous police demands to interrupt the meeting. These circumstances were confirmed in court by witnesses' testimonies and the photographs of the meeting.

4.3 In light of the above, the domestic courts correctly assessed that the author's acts revealed the elements of the administrative infraction of articles 167-1 (breach of the order for organization and conduct of assemblies, meetings, street parades and demonstrations) and 166 (insubordination to a lawful instruction or request of a police officer while he executes his duty to protect the public order) of the Code of Administrative Offences (CAO).

5.1 By letter of 13 March 2002, the author challenges the State party's contention that he organized an illegal meeting and had unsubordinated to police instructions. He reiterates that his acts did not disclose the elements of the administrative infraction under article 167-1 CAO and invokes the definition of meeting ("picket") pursuant to article 2 of the Law on Assemblies.

5.2 The author explains that he was not the organizer of a meeting held near the Central Universal Store in Brest on 10 December 2000. He contends that when he was refused the right to organize the meeting near the Pushkin Public Library, he renounced the idea, thus complying with the decision of the Brest Executive Council; he explains that he decided not to organize a picket at Stroitel Stadium, because it would not "meet the object set" due to the absence of visitors at the site. Notwithstanding, on 10 December 2000, wishing to remind his co-citizens of the commemorative date of the signature of the UDHR and of their rights, at 11 a.m., he distributed leaflets with the UDHR text to passers by. In doing so, he did not commit any breach of the public order nor did he create any threat to the health or life to others. Finally, he reiterates his allegation that he is a victim of violations of his right to impart information, as protected by article 19, paragraph 2, of the Covenant.

Issues and proceedings before the Committee

Consideration on admissibility

6.1 Before considering any claim contained in a communication, the Human Rights Committee must, in accordance with rule 93 of its rules of procedure, decide whether or not the communication is admissible under the Optional Protocol to the Covenant.

6.2 The Committee notes that the same matter is not being examined under any other international procedure of investigation and settlement, and that available domestic remedies have been exhausted. It considers that the conditions set forth in paragraphs 2 (a) and (b) of article 5 of the Optional Protocol have been met.

6.3 The Committee considers that the author has sufficiently substantiated his claim under article 19, paragraph 2, for purposes of admissibility. It concludes that the communication is admissible and proceeds to its examination on the merits.

Consideration on the merits

7.1 The Human Rights Committee has considered the present communication in the light of all the information made available to it, as required under article 5, paragraph 1, of the Optional Protocol.

7.2 The author has claimed that his right to freedom to impart information under article 19, paragraph 2, was violated, since when he distributed the text of the UDHR in the centre of Brest on 10 December 2000, he was arrested and subsequently fined to the equal of 20 minimum monthly wages. The State party has replied that the author violated the provisions of the Administrative Offences Code, because the Executive Council of Brest had designated another venue for the conduct of his meeting, that the author had gone on to organize the meeting in the City centre and had refused to conform to police instructions. From the material before the Committee, it transpires that the author's activities were qualified by the courts as "participation in an unauthorized meeting" and not as "imparting of information". In the Committee's opinion, the above action of the authorities, irrespective of its legal qualification, amounts to a de facto limitation of the author's rights under article 19, paragraph 2, of the Covenant.

7.3 The Committee recalls that article 19 of the Covenant allows restrictions only as provided by law and necessary (a) for respect of the rights and reputation of others; and (b) for the protection of national security or public order (ordre public), or of public health or morals. It further recalls that the right to freedom of expression is of paramount importance in any democratic society, and any restrictions on the exercise of this right must meet a strict test of justification.[2] In the present case, however, the State party has not invoked any specific ground on which the restrictions imposed on the author's activity which, whether or not it took place within the context of a meeting, it is uncontested did not pose a threat to public order, would be necessary within the meaning of article 19, paragraph 3, of the Covenant.

8. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the Covenant, is of the view that the facts before it disclose a violation of article 19, paragraph 2, of the Covenant.

9. In accordance with article 2, paragraph 3 (a), of the Covenant, the State party is under an obligation to provide Mr. Velichkin with an effective remedy, including compensation amounting to a sum not less than the present value of the fine and any legal costs paid by the author. The State party is under an obligation to take measures to prevent similar violations in the future.

10. Bearing in mind that, by becoming a party to the Optional Protocol, the State party has recognized the competence of the Committee to determine whether there has been a violation of the Covenant or not and that, pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory or subject to its jurisdiction the rights recognized in the Covenant and to provide an effective and enforceable remedy in case a violation has been established, the Committee wishes to receive from the State party, within 90 days, information about the measures taken to give effect to the Committee's Views.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the Committee's annual report to the General Assembly.]

Notes

[1] Article 34 of the Constitution reads as follow: "(1) Citizens of the Republic of Belarus shall be guaranteed the right to receive, store, and disseminate complete, reliable, and timely information on the activities of State bodies and public associations, on political, economic, and international life, and on the state of the environment. (2) State bodies, public associations, and officials shall afford citizens of the Republic of Belarus an opportunity to familiarize themselves with material that affects their rights and legitimate interests."

[2] See, inter alia, communication No. 574/1994, *Kim v. the Republic of Korea*, Views dated 3 November 1998 and communication No. 628/1995, *Park v. the Republic of Korea*, Views dated 20 October 1998, and communication No. 780/1997, *Vladimir Laptsevich v. Belarus*, Views adopted on 20 March 2000, para. 8.2.

APPENDIX

Individual opinion by Committee member Ms. Ruth Wedgwood

The city authorities of Brest, in Belarus, arrested a young human rights advocate, Vladimir Velichkin, for conducting a prohibited "meeting" outside a store. The "meeting" consisted of distributing copies of the Universal Declaration of Human Rights to fellow citizens passing by on the sidewalk. Four other persons also distributed copies, and carried posters.

The Committee has found that this action by Belarus was an unreasonable interference with the author's "freedom of expression" and his right to "impart information," protected by article 19 (2) of the International Covenant on Civil and Political Rights.

But in addition, there was a further violation of article 21 of the Covenant, namely, the author's right of peaceful assembly. A State can impose reasonable restrictions on public assemblies in the interests of public safety and public order, and to protect the rights and freedoms of others. Belarus has not attempted to offer any explanation for the Brest authorities' flat ban on all public protests and gatherings, even of a modest size, in areas within the city center.

The author had originally requested permission to gather outside the confines of the Pushkin Public Library. The city of Brest instead has insisted that all protests, demonstrations, and picketing must be confined to a remote sports stadium. Needless to say, a State has no legitimate interest in banning public gatherings merely to limit their influence.

(*Signed*): Ms. Ruth Wedgwood

[Done in English, French and Spanish, the English text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the Committee's annual report to the General Assembly.]

N. Communication No. 1036/2001, *Faure v. Australia* (Views adopted on 31 October 2005, eighty-fifth session)*

Submitted by:	Bernadette Faure (represented by her father, Leonard Faure)
Alleged victim:	The author
State party:	Australia
Date of communication:	19 June 2001 (initial submission)
Subject matter:	Receipt of unemployment benefits conditioned upon performance of compulsory labour
Procedural issues:	Exhaustion of domestic remedies - Substantiation, for purposes of admissibility - Scope of the Covenant
Articles of the Covenant:	Articles 2 and 8
Articles of the Optional Protocol:	Article 5, paragraph 2 (b)

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 31 October 2005,

Having concluded its consideration of communication No. 1036/2001, submitted to the Human Rights Committee on behalf of Bernadette Faure under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the author of the communication, and the State party,

Adopts the following:

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* The following members of the Committee participated in the examination of the present communication: Mr. Nisuke Ando, Mr. Prafullachandra Natwarlal Bhagwati, Mr.Alfredo Castillero Hoyos, Mr. Edwin Johnson, Mr. Walter Kälin, Mr. Ahmed Tawfik Khalil, Mr. Michael O'Flaherty, Ms. Elisabeth Palm, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Hipólito Solari-Yrigoyen, Ms. Ruth Wedgwood and Mr. Roman Wieruszewski.

Pursuant to rule 90 of the Committee's rules of procedure, Committee member Mr. Ivan Shearer did not participate in the adoption of the present decision.

The text of an individual opinion signed by Committee member Ms. Ruth Wedgwood is appended to the present document.

Views under article 5, paragraph 4, of the Optional Protocol

1. The author of the communication, initially dated 19 June 2001, is Bernadette Faure, an Australian and Maltese national, born 22 April 1980. She claims to be a victim of a violation by Australia of her rights under articles 2, paragraphs 2 and 3 (a)-(c), and 8, paragraph 3. She is represented by her father, Leonard Faure, who acts with her express authority.

Factual background

2.1 After leaving high school aged 16 in 1996, the author continuously drew unemployment benefits. On 7 July 1997, the *Social Security Legislation Amendment (Work for the Dole)* Act 1997 ("the 1997 Act") entered into force.

2.2 On 3 November 2000, after having been referred to and attending an "Intensive Assistance" programme at IPA Personnel Ltd (a government-accredited private employment agency), the author failed to comply with the terms of her "Preparing for Work Agreement" (first "activity test" breach in two years). As a result, on 13 November 2000, a rate reduction period was imposed on her unemployment benefit.[1]

2.3 Following completion of the "Intensive Assistance" programme, the author was referred on three occasions to an employer, Mission Australia, to undertake the Work for Dole programme, with an interview scheduled on each occasion. She did not attend any interview. In the meantime, on 12 June 2001, the Human Rights and Equal Opportunities Commission (HREOC) also declined to investigate a complaint lodged on her behalf that the Work for Dole programme amounted to a forced or compulsory labour, reasoning that the alleged violation arose by direct operation of legislation, rather than as a result of a decision-maker's discretion and therefore fell outside of its statutory mandate. HREOC observed, in addition, that "… reducing or cancelling unemployment assistance because a person does not want to participate in the Work for the Dole programme does not constitute forced or compulsory labour, as the nature of the punishment and the degree of involuntariness does not reach the threshold required to breach article 8 (3) (a) of the [Covenant]".

2.4 On 9 July 2001, the author commenced the Work for Dole programme, finishing her initial employment placement on 7 October 2001. After starting a second employment placement on 24 October 2001, she did not attend the placement on 30 October and again on 5-6 November. On 22 November 2001, a rate reduction period was imposed on her unemployment benefit for her unexplained absence on 30 October (second "activity test" breach in two years).[2]

2.5 On 6 December 2001, her unemployment benefit was entirely cancelled for her unexplained absence on 5-6 November 2001 (her third "activity test" breach in two years) and she left the Work for Dole programme. Prior to the cancellation, she was contacted and claimed that she had been too ill to attend the employment placement. She was unable to provide a medical certificate for her absence, claiming to have lost the original one provided by her doctor, and was unable to provide a copy from the doctor. The cancellation resulted in a two months non-payment period of her unemployment benefits.

2.6 On 10 December 2001, an administrative review officer affirmed the decision to cancel the author's unemployment benefit. On 26 February 2002, her unemployment benefits were reinstated following a renewed application for payment of unemployment benefits.

The complaint

3.1 The author alleges that she was required to perform forced or compulsory labour in violation of article 8, paragraph 3 (a), of the Covenant, in particular by being required to attend the Work for Dole programme. If she refused to participate, she would be impoverished by a reduction or suspension of her unemployment benefits.

3.2 The author further claims that she is without a remedy for her complaint, in violation of article 2, paragraphs 2 and 3 (a), (b) and (c), of the Covenant, as her complaint to HREOC was not accepted for consideration. In particular, she argues that HREOC had the authority to make reports or recommendations to the Attorney-General which could have been utilized in this case.

The State party's submissions on admissibility and merits

4.1 By submissions of 17 June 2002, the State party challenges both the admissibility and merits of the communication. The State party details the operation of its WFD programme, imposing on persons such as the author the obligation to perform certain community labour, upon pain of reduction of unemployment benefits. The scheme is described in greater detail in Annex to the communication.

4.2 As to the admissibility of the communication, the State party argues that the principal claim under article 8 is inadmissible for failure to exhaust domestic remedies, as the author's participation in the Work for Dole programme could have been challenged under an extensive domestic social security review and appeals system established by law. Administrative review is available for any decision made in relation to social security entitlement - thus, a decision to include participation in a Work for Dole programme in a person's "Preparing for Work" Agreement is subject to review, as is a decision that a person participate in a Work for Dole programme as part of the general activity test. This objective review is carried out by specialist officer, not being the original decision-maker. Thereafter, review is available in the Social Security Appeals Tribunal and appeal to the Administrative Appeals Tribunal. Further appeal to the federal courts and the High Court of Australia then is available.

4.3 In the present case, the author only sought an internal administrative review on 10 December 2001, not availing herself of the further appeals available. The communication was submitted well prior to that date, despite the author having been notified on numerous occasions as to her appeal rights. She can thus be taken to have been reasonably aware of her review rights, and any doubts she may have about their effectiveness cannot absolve her of her obligation to pursue them.

4.4 The author also did not apply for judicial review of HREOC's decision that it did not have jurisdiction to entertain her complaint on the basis that it concerned direct operation of social security law, rather than any exercise of discretion by a decision-maker. Alternatively, the State party argues that the author could have applied to Federal Court directly for judicial review of the decision to refer her to a Work for Dole programme.

4.5 Turning to the subsidiary claim under article 2, the State party argues that the claim under article 2 is incompatible with the Covenant and further inapplicable to the facts pleaded. The State party refers to the Committee's jurisprudence that article 2 is of accessory nature to the substantive articles of the Covenant, and thus, in the absence of a violation of article 8 of the Covenant, a separate article 2 issue cannot arise. In addition, the communication contains no claims that are capable of amounting to a breach of article 2, nor does the communication set out the nature of the alleged violation claimed.

4.6 The State party adds that this claim is inadmissible for failure to exhaust domestic remedies on the basis of the arguments set out in this respect in relation to article 8, supra. Finally, it contends this claim is unsubstantiated, for purposes of admissibility: it is a mere assertion, with no evidence submitted to suggest that the author has been denied an effective remedy.

4.7 On the merits of the article 8 claim, the State party points out that in the absence of substantive consideration of the issue of forced labour by the Committee, the Committee should be guided by the approaches of other international organizations.[3] While reference to the ILO conventions on forced labour (No. 29 of 1930) and on the abolition of forced labour (No. 105 of 1957) was deliberately omitted from the Covenant because of difficulties with the ILO definitions, it is suggested that conclusions of the ILO's Committee of Experts can still be drawn on for assistance in determining the "permissible" forced or compulsory labour that can be imposed. An academic commentator argues that States must meet certain minimum labour and social welfare law standards contained in the two ILO conventions in order to come within the exceptions set out in article 8, paragraph 3, of the Covenant.[4]

4.8 The State party concedes that the ILO Committee of Experts monitoring Chilean legislation on unemployment benefits considered a loss of benefits imposed if a person refused to carry out community relief work to be "equivalent to a penalty in the sense of the Convention". It distinguishes the schemes, however, on the basis that, in Chile, payment of unemployment benefits was conditional upon payment of contributions for 52 weeks of the preceding two years, while in Australia benefits are not conditional upon any prior contribution. In addition, Chilean unemployment benefits are time-bound, while in Australia they are not. In the State party's view, therefore, the Committee of Experts' comments on Chile are not presently relevant.

4.9 Turning to the relatively scarce jurisprudence arising under the similar terms of article 4 of the European Convention on Human Rights, the State party refers to the case of *Van der Mussele v. Belgium*.[5] The European Court there held that a law student, voluntarily choosing to enter the legal profession, could not be held to have been required to perform forced labour by a requirement to undertake a certain amount of pro bono work during his clerking apprenticeship in order to register as advocates. In the Court's view, the service did not impose a burden so excessive or disproportionate to the advantages attached to future exercise of the profession that it could be treated as not having been voluntarily accepted beforehand. Given that the governing ideas of the exceptions to article 4 were the general interest, social solidarity and what is in the ordinary or normal course of affairs, the requirement of service was not disproportionate or unreasonable.

4.10 In *X v. The Netherlands*,[6] the European Commission of Human Rights found that a suspension for 26 weeks of a builder's unemployment benefit due to the builder's refusal, on grounds of alleged over-qualification, of a job offer made to him did not amount to forced or compulsory labour. The Commission reasoned that nobody was forced, by penalty, to accept a job offer made by competent public authorities. Rather, acceptance of such an offer was simply a condition to receipt of unemployment benefits, a refusal being penalized only by temporary loss of those benefits.

4.11 The State party observes that the Covenant's exception for "any work or service which forms part of normal civic obligations" is not specifically defined, but should be interpreted against the backdrop of the minimum standards contained in ILO Convention No. 29. That Convention, in article 2, paragraph 2 (e), excludes:

> "... minor communal services of a kind which, being performed by the members of the community in the direct interests of the said community, can therefore be considered as normal civic obligations incumbent on members of the community, provided that the members of the community or their direct representatives shall have the right to be consulted in regard to the need for such services".

4.12 It is also relevant that article 11 sets out a minimum age of 18 and prior medical examinations for those required to perform compulsory labour, while article 12 states that the maximum labour period shall not exceed sixty days per year. Article 13 provides that the working hours in question should correspond to those of voluntary labour, and article 14 sets out cash remuneration not less than prevailing for similar work in the district. Article 15 applies workers' compensation and incapacitation legislation to both forms of labour. The State party argues that the Work for Dole programme generally satisfies the minimum standards of the Convention. It is quite proper, as recognized in the above-mentioned ILO instruments, to place reasonable conditions on social security payments. By participating in the Work for Dole programme, long-term unemployed persons enhance their skills, employability and thus future self-sufficiency. Unemployment benefits in Australia are not dependent on prior contributions, nor are they time-bound. Nobody is forced to accept them, but if an individual does choose to do so, compliance with participation in a Work for Dole programme is a reasonable condition.

4.13 The State party argues that the present communication raises issues of compulsory rather than forced labour, given the absence of any physical or mental constraint. Applying the *Van der Mussele* test developed by the European Court, the author's participation in the Work for Dole programme does not even reach the threshold of compulsory labour, as neither the necessary intensity of penalty or of involuntariness are involved. The State party points out that it carefully considered the programme's compatibility with its international obligations, as borne out by statements made during the second parliamentary reading of the draft Bill:

> "The government is cognizant of its international obligations. It has taken advice of the Attorney-General's Department that a work for the dole initiative should not contravene our international obligations, provided that the work offered under work for the dole is 'suitable' and 'reasonable' for that person. The fact that payment of unemployment allowance is not based on any prior mandatory contribution, coupled with the positive benefits of work for the dole for participants, means that the initiative should be regarded as reasonable in its requirement of a contribution to the community from participants."

4.14 Assessing the two dimensions of penalty and involuntariness, the State party points out that a failure to participate in the programme, without reasonable excuse, initially only leads to a reduction in the rate of unemployment benefits payable, with repeated failure - again without reasonable excuse - leading to non-payment for 2 months only. There is no absolute right to social security, and ILO standards on unemployment benefits accept that they may be withdrawn where an individual refuses an offer of suitable and reasonable employment.[7] In this light, there is no element of penalty for failure to participate in the Work for Dole programme that would raise participation in the programme to the threshold of compulsory labour.

4.15 In terms of involuntariness, the State party argues that the programme modalities satisfy requirements of reasonableness and proportionality. Unemployed people are not required to accept benefits but, if they do, a precondition to receipt may be participation in the Work for Dole programme. Long-term youth unemployment is a serious problem in Australia, and this programme is part of a series of innovative responses to the problem. The programme is based on the concept of mutual obligation between an unemployed person and the community supporting him or her. The relevant projects provide real tangible benefits to communities in the form of community facilities, infrastructure, care and assistance. The programme is specially designed to improve the skills, employability, self-esteem and experience of young unemployed people. 18-20 year olds are only required to work 12 hours per week, while older persons work 15 hours per week, with working hours corresponding to those in the general marketplace.

4.16 In addition, participants can only work in the programme for six months at a time, and for six months per year. Job search requirements applicable to participants are reduced to two employer contacts per fortnight. Checks and balances, coupled with review processes, ensure specific work is suitable and reasonable, with a participant being able to raise these issues. The State contracts personal injury and third party liability insurance for participants. Finally, a fortnightly supplement is paid in view of the extra costs. In light of these elements, the burden the Work for Dole programme imposes on young unemployed persons as a condition of receiving unemployment benefits is not unreasonable, or disproportionate when weighed up to the positive benefits received by them and the community.

4.17 The author had received unemployment benefits for four years before her referral to the programme, at age 21. Previously, she had been involved in a number of activities enhancing her employability, including a year-long Intensive Assistance programme. Her benefits were cancelled because of her failure to provide supporting evidence for alleged illness and thus being unable to demonstrate a reasonable excuse for her absence. This decision was upheld on review. In the review, she also contended she was unable to carry out concreting work as part of the project. However the Community Work Co-ordinator for the project advised that the concreting was minor, there were other young women involved and nobody was asked to do anything they were incapable of physically performing. In the State party's view, these processes show how checks and balances work to ensure that Work for Dole participants are given reasonable and suitable work.

4.18 In conclusion, the State party invites the Committee to find that the author was not required to engage in compulsory labour, within the meaning of article 8 of the Covenant, or that, if so, the labour is justified by the exception of "normal civic obligation" contained in article 8, paragraph 3 (c) (iv), resulting in no violation of the Covenant.

4.19 On the merits of the article 2 claims, the State party argues that as the substantive claim under article 8 is either inadmissible or without merit, the assertion of an article 2 claim must also be considered to be without merit. In any event, the author has not provided evidence sufficient to enable a proper consideration of this claim. Even if the communication could be said to contain any substantiated evidence, the State party contends, in the light of its admissibility submissions on article 2, that it fully protects Covenant rights under common law and Federal, State and Territory legislation. In the present case, numerous appeal and review instances were available but not utilized. Her failure to exhaust domestic remedies also supports a finding that there is no violation.

4.20 On the specific claim that HREOC did not make a report and recommendations to the Attorney-General, the State party points out that this was because HREOC rejected the author's complaint and thus cannot serve as a basis for an article 2 claim.

The author's comments on the State party's submissions

5.1 By letter of 1 September 2002, the author challenged the State party's submissions, rejecting the present applicability of the *Van der Mussele* reasoning of the European Court, on the basis that she was not in an apprentice-teacher relationship or training for a specific vocation compulsory labour. In any event this precedent is inapplicable as she was never offered, and thus could not have refused, suitable work, as said to be required by the ILO instruments. Rather, she was enrolled into the Work for Dole programme, and subsequently had her unemployment benefits suspended, in the absence of a prior offer of suitable work. She emphasizes that she was enrolled into the Work for Dole programme for purposes of doing community work. She rejects the European Commission's reasoning in the *X* case that suspension of unemployment benefits cannot be taken as amounting to payments later suspended without having being offered such work.

5.2 The author argues that the threat, real or perceived, of an entire suspension of unemployment benefits in the event of her failure to participate in the Work for Dole programme must be taken as imposing a high degree of mental constraint, contending that "the prospective scenario of starvation cannot be reasonably construed otherwise".

5.3 The author rejects the contention that domestic remedies were not exhausted, arguing that HREOC and certain Work for Dole administrative correspondence did not explicitly advise a right of review. In any event, the threat of cancellation of unemployment benefits described in the latter conveyed the impression that no right of review was available. The author cites the Committee's decision in *Landry v. Canada*[8] as support for the proposition that in such circumstances the State party is stopped from advancing a claim that domestic remedies have not been exhausted.

Issues and proceedings before the Committee

Consideration of admissibility

6.1 Before considering any claims contained in a communication, the Human Rights Committee must, in accordance with article 93 of its rules of procedure, decide whether or not it is admissible under the Optional Protocol to the Covenant.

6.2 On the issue of exhaustion of domestic remedies, the Committee observes that there is no dispute that the author comes squarely within the scope of the impugned legislation, with the alleged violation deriving from the direct application of the law to her. As the Committee observed in a similar context, it would be futile to expect an author to bring judicial proceedings which would merely confirm the undisputed fact that the primary legislation in question, in this case the 1997 Act and the requirement of participation in the Work for Dole programme imposed pursuant to it, does in fact apply to her, when what is being challenged before the Committee is the substantive operation of that law, the content of which is not open to challenge before the domestic courts.[9] As the State party has not shown how the substantive content of the Work for Dole regime set out in the 1997 Act that is applicable to her can be challenged in the domestic courts, the Committee considers that it is not precluded by article 5, paragraph 2 (b), of the Optional Protocol from consideration of the case.

6.3 As to the argument that the claims under articles 2 and 8 fall *ratione materiae* outside the scope of the Covenant and are insufficiently substantiated, the Committee considers that the author has advanced arguments of a sufficient weight to substantiate, for purposes of admissibility, her claims under these articles of the Covenant.

Consideration of the merits

7.1 The Human Rights Committee has considered the present communication in the light of all the information made available to it by the parties, as provided in article 5, paragraph 1 of the Optional Protocol.

7.2 Turning first to the claim under article 2 of the Covenant, the Committee recalls that article 2 requires a State party to provide an effective remedy for breaches of Covenant rights. In its decision in the case of *Kazantzis v. Cyprus*,[10] the Committee stated that "Article 2, paragraph 3, requires that in addition to effective protection of Covenant rights States parties must ensure that individuals also have accessible, effective and enforceable remedies to vindicate those rights ... A literal reading of this provision seems to require that an actual breach of one of the guarantees of the Covenant be formally established as a necessary prerequisite to obtain remedies such as reparation or rehabilitation. However, article 2, paragraph 3 (b), obliges States parties to ensure determination of the right to such remedy by a competent judicial, administrative or legislative authority, a guarantee which would be void if it were not available where a violation had not yet been established. While a State party cannot be reasonably required, on the basis of article 2, paragraph 3 (b), to make such procedures available no matter how unmeritorious such claims may be, article 2, paragraph 3, provides protection to alleged victims if their claims are sufficiently well-founded to be arguable under the Covenant." (internal footnote omitted.)

7.3 Applying this reasoning to the present claim that the State party did not provide an effective remedy for the alleged breach of article 8 of the Covenant, the Committee observes, with reference to its admissibility considerations identified above in the context of exhaustion of domestic remedies, that, in the State party's legal system, it was and remains impossible for a person such as the author to challenge the substantive elements of the Work for Dole programme, that is, the obligation imposed by law on persons such as the author, who satisfy the preconditions for access to the programme, to perform labour in exchange for receipt of unemployment benefits. The Committee recalls that the State party's proposed remedies address the question of whether or not an individual in fact satisfies the requirements for access to the programme, but no remedy is available to challenge the substantive scheme for those who are by law subject to it.

7.4 As the Committee's consideration (*infra*) on the merits of the substantive article 8 shows, the question presented undoubtedly raises an issue, in the language of the Committee's decision in *Kazantzis*, that was "sufficiently well-founded to be arguable under the Covenant". It follows, therefore, that the absence of a remedy available to test an arguable claim under article 8 of the Covenant such as the present amounts to a violation of article 2, paragraph 3, read together with article 8, of the Covenant.

7.5 Concerning the principal claim under article 8, paragraph 3, of the Covenant, the Committee observes that the Covenant does not spell out in further detail the meaning of the terms "forced or compulsory labour". While the definitions of the relevant ILO instruments may be of assistance in elucidating the meaning of the terms, it ultimately falls to the Committee to elaborate the indicia of prohibited conduct. In the Committee's view, the term "forced or compulsory labour" covers a range of conduct extending from, on the one hand, labour imposed on an individual by way of criminal sanction, notably in particularly coercive, exploitative or otherwise egregious conditions, through, on the other hand, to lesser forms of labour in circumstances where punishment as a comparable sanction is threatened if the labour directed is not performed. The Committee notes, moreover, that article 8, paragraph 3 (c) (iv), of the Covenant exempts from the term "forced or compulsory labour" such work or service forming part of normal civil obligations. In the Committee's view, to so qualify as a normal civil obligation, the labour in question must, at a minimum, not be an exceptional measure; it must not possess a punitive purpose or effect; and it must be provided for by law in order to serve a legitimate purpose under the Covenant. In the light of these considerations, the Committee is of the view that the material before it, including the absence of a degrading or dehumanizing aspect of the specific labour performed, does not show that the labour in question comes within the scope of the proscriptions set out in article 8. It follows that no independent violation of article 8 of the Covenant has been made out.

8. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts before it disclose a violation of article 2, paragraph 3, read together with article 8, of the Covenant.

9. While in accordance with article 2, paragraph 3 (a), of the Covenant, the State party is under an obligation to provide the author with an effective remedy, the Committee is of the view that in the present case its Views on the merits of the claim constitutes sufficient remedy for the violation found. The State party is under an obligation to ensure that similar violations of the Covenant do not occur in the future.

10. Bearing in mind that, by becoming a State party to the Optional Protocol, the State party has recognized the competence of the Committee to determine whether there has been a violation

of the Covenant or not and that, pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the Covenant to provide an effective and enforceable remedy in case a violation has been established, the Committee wishes to receive from the State party, within 90 days, information about the measures taken to give effect to its Views.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the Committee's annual report to the General Assembly.]

ANNEX

The State party's description of the WFD programme

The WFD programme was introduced by the 1997 legislation. Its object, according to the statute, is "to reinforce the principle of mutual obligations applying to [unemployment benefits] by recognizing that it is fair and reasonable that persons in receipt of such payments participate in approved programmes of work in return for such payments and to set out the means by which they may be enabled, or required, to undertake such work".

4.3 The State party points out that a Work for Dole programme cannot require more than 24 or 30 hours' work (up to and beyond 21 years of age, respectively) per fortnight, and an individual is referred to a programme for a maximum of 6 months per year. To qualify for an unemployment benefit, a person must generally:

(a) Be unemployed;

(b) Satisfy the "activity test" or be exempt from it by virtue of, for example, being in full-time education, being in a remote area, giving birth to a child, and so forth. The "activity test" requires a person to be actively seeking and willing to undertake suitable paid work and to attend such programmes, for example the Work for the Dole programme, and training that may be directed;

(c) Be prepared to enter into and comply with a "Preparing for Work" Agreement, which may include participating in a Work for Dole programme; and

(d) Satisfy certain other formal criteria of age, residence and the like.

4.4 After receiving an unemployment benefit for six months, an unemployed person must, if subject to "activity testing", commence a programme or activity of their choice, of which the Work for Dole programme is one, geared towards enhancing their employment prospects. Failure on the part of the person to choose a programme or activity results in referral for a Work for Dole placement for six months as a matter of administrative practice if:

(a) The person receives the full rate of unemployment benefit;

(b) The person possesses the skills and experience to perform the required tasks;

(c) The tasks of the employment placement in question are medically appropriate and do not otherwise pose occupational health and safety; and

(d) Certain other requirements are satisfied.

4.5 Once a Work for Dole placement begins, the person's unemployment benefit is augmented by AUS$ 21 per week reflecting the extra costs of participating in the programme. Community Work Co-ordinators both assist the person in the placement and submit, under strict requirements, participation reports to ensure that participation requirements are being met.

4.6 Failure to commence or complete the Work for Dole programme, including where this forms part of a Preparing for Work Agreement, or failure to comply with conditions of a Work for Dole programme, result, in the absence of reasonable excuse, in an "activity test" breach and accompanying financial penalties in the form of reduced payment of unemployment benefits. Any third such breach within a two year period results in a two-month non-payment of unemployment benefits.

APPENDIX

Individual opinion by Committee member Ms. Ruth Wedgwood

In a world that is still replete with problems of caste, customary systems of peonage and indentured labour, forced labour in remote areas under conditions that often mimic slavery, and the disgrace of sexual trafficking in persons, it demeans the significance of the International Covenant on Civil and Political Rights to suppose that a reasonable work and training requirement for participation in national unemployment benefits in a modern welfare State could amount to "forced or compulsory labour" within the meaning of article 8 (3) (a).

Australia has a programme of unemployment benefits that supports new job seekers for six months, so long as they are willing to accept gainful employment. After six months, continued receipt of benefits may be conditioned on the participant's willingness to enhance his or her job skills and give something back to the community, through a "Work for Dole" programme. The latter programme is limited to 12 hours per week (for persons under 21 years of age), and 15 hours per week (for persons of 21 years or older).

The author of this communication, Ms. Bernadette Faure, began to draw unemployment benefits immediately after leaving high school in 1996. In November 2000, after attending an "Intensive Assistance" programme at a government-accredited employment agency, she failed to comply with the terms of a "Preparing for Work Agreement" and her public benefit was partially reduced. She then failed to attend three scheduled interviews with an employer called "Mission Australia" as part of the Work for Dole programme. Finally, in July 2001, she took part successfully in the "Work for Dole" programme and worked at a job placement until 7 October 2001. She started another placement on 24 October 2001, but failed to show up on 30 October or 5-6 November 2001, and did not corroborate her claim of illness with any medical certificate. The unexcused absence on 30 October resulted in a rate reduction of 24 per cent and the second absence resulted in cancellation of her benefits. Her benefits were reinstated on 26 February 2002.

Ms. Faure asserts that Australia has imposed a type of "forced or compulsory labour" forbidden by the Covenant, by requiring that she should take part in a work and training programme as a condition of receiving public unemployment benefits. The State party argues that the programme contributes to the acquisition of employment skills, and is a form of "mutual obligation" that respects the claims of the community and the job seeker. Ms. Faure characterizes the work requirement in terms one might have thought originally aimed at horrific instances such as the forced labour required by colonial powers to build canals and roads, rather than the mutual obligations of a modern democratic society.

Professor Manfred Nowak, in his work on the United Nations Covenant on Civil and Political Rights, CCPR Commentary (2nd edition 2005), at page 202, has concluded that "The mere lapse of unemployment assistance when a person refuses to accept work not corresponding to his or her qualifications does not … represent a violation [of article 8]; in this case, neither the intensity of the involuntariness nor that of the sanction reaches the degree required for forced or compulsory labour." Professor Nowak's common-sense assessment is faithful to the purposes of article 8. On the uncontested facts of this case, I would dismiss the author's claim of "forced or compulsory labour" as inadmissible for lack of substantiation.

The author has also failed to exhaust administrative and judicial remedies. In her complaint, the author challenges the "Work for Dole" programme because, inter alia, her work assignments were not "suitable" (e.g., she was required to learn how to apply "concrete" in a community project) and did not amount to training for a "specific vocation". See Views of the Committee, paragraphs 4.17 and 5.1 supra. Thus, she says, her assignments cannot be characterized as apprenticeship or vocational training that might escape the opprobrium of "forced labour".

But the author did not challenge the "suitability" of her assignments through the framework of administrative and judicial remedies available in Australia for a "Work for Dole" participant. A beneficiary is apparently entitled to challenge a particular work assignment, or dispute its use as a "general activity test" for the continued receipt of benefits. See id., paragraphs 4.2-4.4, supra. The appeals include review by a specialist officer, and remedies in the Social Security Appeals Tribunal, Administrative Appeals Tribunal, federal courts and High Court.

So, too, after the author's unexcused absences from her employment placement resulted in a loss of benefits, she declined to pursue any appeal of the decision beyond a first-level review, even though she was "notified on numerous occasions as to her appeal rights". See id., paragraph 4.3.

It is true that the author did seek early intervention by the Australian Human Rights and Equal Opportunities Commission, after failing to show up for three scheduled interviews at Mission Australia, and suffering an 18 percent reduction in her benefits. See id., paragraphs 2.2-2.3. In a decision on 12 June 1991, the Australian human rights commission concluded that its jurisdiction was limited to the discretionary decisions of government personnel, rather than the review of statutory mandates. But the Australian human rights commissioners also observed on the merits that "reducing or cancelling unemployment assistance because a person does not want to participate in the Work for the Dole programme does not constitute forced or compulsory labour, as the nature of the punishment and the degree of involuntariness does not reach the threshold required to breach article 8 (3) (a) of the Covenant". The author did not apply for judicial review of the Commission's decision.[11]

By virtue of these facts, it is difficult to conclude that the author has exhausted her domestic remedies. Nor has she established that the State party failed to provide an effective remedy as required by article 2 for an "arguable" violation of Covenant rights.

(Signed): Ms. Ruth Wedgwood

[Done in English, French and Spanish, the English text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the Committee's annual report to the General Assembly.]

Notes

[1] The State party explains that the reduction in payment for a first activity test breach in two years is 18 per cent of the person's maximum basic rate of payment for 26 weeks.

[2] The State party explains that the reduction in payment for a second activity test breach in two years is 24 per cent of the person's maximum basic rate of payment for 26 weeks.

[3] The State party refers to but two occasions where the issue was even touched on: *Timmerman v. The Netherlands* communication No. 871/1999, Decision adopted on 29 October 1999, and *Wolf v. Panama* communication No. 289/1988, Views adopted on 26 March 1992. [Note to the Committee: In the first case, the Committee declared inadmissible a claim that engaging in certain professional employment on a disputed pay scale amounted to forced labour, while in the second, the Committee found unsubstantiated a claim that a remind prisoner had to perform forced labour while in pre-trial custody.]

[4] Manfred Nowak, *U.N. Covenant on Civil and Political Rights: CCPR Commentary*, N.P. Engel, Kehl am Rhein, 1993, at 157.

[5] Series A, 70 (1983).

[6] No. 7602/76, 7 DR 161 (1976).

[7] ILO Convention No. 44 of 1934 Ensuring Benefit or Allowances to the Involuntarily Unemployed and ILO Convention No. 168 of 1988 Concerning Employment Promotion and Protection against Unemployment.

[8] Communication No. 112/1981, Decision adopted on 8 April 1986.

[9] See the Committee's rejection of the same argument with respect to mandatory detention provisions of the *Migration* Act in *A. v. Australia*, case No. 560/1993, Views adopted on 4 March 1997, *C. v. Australia*, case No. 900/1999, Views adopted on 28 October 2002, *Baban et al. v. Australia*, communication No. 1014/2001, Views adopted on 6 August 2003, and *Bakhtiyari v. Australia*, case No. 1069/2002, Views adopted on 29 October 2003.

[10] Case No. 972/2001, Decision adopted on 7 August 2003, at para. 6.6.

[11] In *Baban et al. v. Australia*, communication No 1014/2001, Views adopted on 6 August 2003, this member offered the view that the Committee "should not presume what the courts of the State party might decide in a particular case. A court's interpretation of parliamentary intent may be informed by Covenant norms, and the permissible inference that parliament would have wished to comply with the State party's treaty obligations". See also *Young v. Australia*, case No. 941/2000, Views adopted on 6 August 2003 (concurring opinion of R. Wedgwood).

O. Communication No. 1042/2002, *Boimurudov v. Tajikistan* (Views adopted on 20 October 2005, eighty-fifth session)*

Submitted by:	Abdukarim Boimurodov (not represented by counsel)
Alleged victim:	Mustafakul Boimurodov (author's son)
State party:	Tajikistan[1]
Date of communication:	24 September 2001 (initial submission)
Subject matter:	Death sentence after unfair trial, torture
Substantive issues:	Degree of substantiation of claims, adequacy of State party response
Procedural issues:	None
Articles of the Covenant:	6, 7, 9 (1), (2), 14 (1), 3 (a), (b), (d) and (g)
Articles of the Optional Protocol:	2

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 20 October 2005,

Having concluded its consideration of communication No. 1042/2001, submitted to the Human Rights Committee on behalf of Mustafakul Boimurodov under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the author of the communication, and the State party,

Adopts the following:

Views under article 5, paragraph 4, of the Optional Protocol

1. The author is Abdulkarim Boimurodov, a Tajik citizen born in 1955. He submits the communication on behalf of his son, Mustafakul Boimurodov, also a Tajik citizen, born in 1976, currently imprisoned in Dushanbe, Tajikistan. He claims that his son is a victim of violations by

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* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Prafullachandra Natwarlal Bhagwati, Ms. Christine Chanet, Mr. Maurice Glèlè Ahanhanzo, Mr. Edwin Johnson, Mr. Walter Kälin, Mr. Ahmed Tawfik Khalil, Mr. Rajsoomer Lallah, Mr. Michael O'Flaherty, Ms. Elisabeth Palm, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Ivan Shearer, Mr. Hipólito Solari-Yrigoyen and Mr. Roman Wieruszewski.

Tajikistan of articles 6; 7; 9 paragraphs 1 and 2; and 14 paragraphs 1, 3 (a), (b), (d) and (g), of the International Covenant on Civil and Political Rights. The communication also appears to raise issues under article 9, paragraph 3. He is not represented by counsel.

Factual background

2.1 On the evening of 10 October 2000, policemen came to the author's apartment, where he lived with his son, and without presenting any search or arrest warrant, searched the premises and arrested his son. From 10 October until 1 November 2000, the author's son was detained at a temporary detention centre, and was then moved to an investigation detention centre. For a total of 40 days he was held incommunicado; during this period none of his relatives knew where he was, and he had no access to a lawyer.

2.2 From the first day of his arrest, the author's son was allegedly tortured by policemen from various departments, in order to force him to confess to charges of terrorism. The torture consisted of beatings with a truncheon, a pistol handle, and a metal pipe on all parts of the body. Several toenails were pulled out with pliers. His son sought medical assistance on 1 and 8 November 2000, and 2 April 2001; the medical history file states that he had sustained cranial trauma, but other injuries sustained as a result of the torture are not recorded, such as the fact that he was missing nails on several toes. Several officers were subsequently charged in relation to their mistreatment of the author's son, but none were prosecuted, and all those involved continue to work as policemen.

2.3 Unable to withstand the torture, the author's son confessed to the charges against him, which related to his alleged involvement in 10 incidents of terrorism, which involved the following offences: participation in terrorist acts, murder, attempted murder, and unlawful possession and preparation of explosives. It transpires that charges were pressed only in relation to three incidents of terrorism: these related to an explosion at a Korean missionary centre on 1 October 2000, as a result of which 9 people died; an explosion at the home of the ex-wife of the author's son on 10 October 2000, which severely injured her and killed another person; and an explosion at a shop. The author notes that the fact his son confessed to charges relating to all 10 incidents, even those in respect of which charges were not prosecuted at trial, indicates that his confession was forced.

2.4 At his son's trial in the Supreme Court in March 2001, the presiding judge was allegedly biased in favour of the prosecution, interrupting the testimony of the accused and his witnesses when they did not say what the authorities wanted them to say. Initially, the judge did not want certain defence witnesses to testify; only on the insistence of his son's lawyer was their testimony heard. In relation to the bombing of the Korean missionary centre, these witnesses gave evidence confirming the alibi of the author's son for the time of the explosion. However, the presiding judge discarded these witnesses' evidence, on the basis that they were neighbours and relatives of the accused; the judge instead relied on testimony of prosecution witnesses who said they had seen the author's son at the scene of the crime. One prosecution witness who said he was unsure whether he had seen the author at the scene was subsequently 'threatened' by the judge; this witness later changed his testimony and confirmed that he had indeed seen the author's son at the missionary centre at the time in question. Regarding the bombing of the apartment of the author's former daughter-in-law, the author claims that the court did not properly investigate alternative versions of the bombing.

2.5 The court relied on prosecution evidence regarding an explosive substance discovered in the author's apartment, which was identified by the authorities as 73.5 grams of ammonal. However, as the author explained to the judge, he himself had bought the substance, thinking it was sulphur. He further states that, because there are no experts in explosives in Tajikistan, he doubts whether the substance was formally analysed at all.

2.6 During the trial, his son retracted his confession, told the judge it was given under torture, and even named those who abused him. He also complained that the search of the apartment had been conducted illegally, and that he had not had any access to family or a lawyer for 40 days. On 13 July 2001, despite these arguments, his son was found guilty of involvement in all three terrorist acts and sentenced to death. On 12 October 2001, his appeal to the appellate instance of the Supreme Court was partially upheld; his conviction on charges relating to the bombing of the shop was set aside for lack of evidence. However, his conviction for the other two terrorist attacks was confirmed, as was the death sentence.

2.7 The author requested the Committee to intervene to prevent his son's execution. On 26 December 2001, the Committee, acting through its Special Rapporteur, requested the State party not to carry out the execution of the author's son pending the Committee's consideration of the communication. Although the State party did not respond to this request, it transpired from a subsequent submission by the author (1 September 2002) that by decision of the Presidium of the Supreme Court of 20 June 2002, his son's death sentence was commuted to 25 years' of imprisonment.

The complaint

3. The author claims that his son's arrest, trial and ill-treatment whilst in custody gives rise to violations of articles 6, 7, 9, paragraphs 1 and 2, and 14 paragraphs 1, 3 (a), (b), (d) and (g) of the Covenant.

The State party's observations on admissibility and merits

4.1 By note of 5 March 2002, the State party submitted that the author's son, a student at the Islamic University, was arrested and charged in connection with a series of bomb blasts in Dushanbe. Specifically, he was charged with conspiring and attempting to kill his ex-wife in a bomb blast, caused by a device installed in a cassette player. The blast severely injured the woman and killed another person. On 11 October 2000, explosives and detonators were found in the apartment where the author's son lived. In the course of the investigation, he confessed to having prepared the explosive device, together with two accomplices. He was tried in the Supreme Court and found guilty of terrorist acts, murder, attempted murder, and unlawful possession and preparation of explosives, and was sentenced to death. However, as a result of an appeal, his sentence was changed.

4.2 The State party notes that the General Procurator had opened an investigation in the course of which the participation of Mr. Boimurodov in the explosions would again be reviewed.

Author's comments on the State party's submissions

5.1 In his comments on the State party's submission dated 1 September 2002, the author clarifies that on 12 October 2001, his son's conviction was altered on appeal by the Supreme Court only in relation to his alleged involvement in the bombing of the shop; in this regard his conviction was overturned. However, his conviction in relation to the other two bombings, and the sentence of death, stood.

5.2 The author states that on 20 June 2002, the Presidium of the Supreme Court decided to overturn his son's conviction in relation to the bombing at the Korean missionary centre, and to refer the matter back for further investigation. It transpires that the General Procurator filed a protest with the Court, in light of another person's confession to involvement in that bombing. The conviction in relation to the bombing at the ex-wife's apartment was confirmed but the death sentence against his son was commuted to 25 years' imprisonment.

5.3 The author contends that the allegations about his son's torture and unfair trial have not been answered by the State party, and that his son has still not been provided with an effective remedy in relation to the violations of the Covenant of which he was a victim.

5.4 On 16 January 2004, the author states that the further investigation ordered by the Presidium of the Supreme Court on 20 June 2002 had still not been completed, which, according to the author, constitutes a violation of his son's right to a fair trial without undue delay.[2]

Issues and proceedings before the Committee

6.1 Before considering any claim contained in a communication, the Human Rights Committee must, in accordance with rule 93 of its Rules of Procedure, decide whether or not the case is admissible under the Optional Protocol to the Covenant.

6.2 The Committee has ascertained, as required under article 5, paragraph 2 (a), of the Optional Protocol, that the same matter is not being examined under another procedure of international investigation or settlement.

6.3 The Committee notes that, in view of the commutation of Mr. Boimurodov's death sentence in 2002, there is no longer any factual basis for the claim under article 6 of the Covenant. Accordingly, this claim has not been substantiated, and is therefore inadmissible pursuant to article 2 of the Optional Protocol.

6.4 In relation to the author's claims under articles 9, paragraphs 1 and 2, and 14, paragraph 3 (a), the Committee notes that the author has not alleged that his son was not informed of the charges against him upon arrest, but that no arrest warrant was presented. Further, there is no information before the Committee about how, when, or if at all the arrest of the author's son was sanctioned by the relevant authorities. In the absence of such information, the Committee considers that the author has failed sufficiently to substantiate these claims, and accordingly declares them inadmissible under article 2 of the Optional Protocol. However, the Committee considers that the facts before it also appear to raise issues under article 9, paragraph 3 of the Covenant; in that respect, the Committee considers the Communication to be admissible.

6.5 In relation to the author's claims under article 14, paragraph 1, the Committee notes that the author challenges the Court's assessment of the testimony of defence and prosecution witnesses, as well as the analysis of material discovered in the author's apartment. The Committee recalls its jurisprudence that it is generally for the courts of States parties to the Covenant to evaluate facts and evidence in a particular case, unless it can be ascertained that the evaluation was clearly arbitrary or amounted to a denial of justice.[3] On the information before it, the Committee considers that the author has failed sufficiently to substantiate that his son's trial in the present case suffered from such defects. Accordingly, this claim is inadmissible under article 2 of the Optional Protocol.

6.6 In relation to the author's claim under article 14, paragraph 3 (d), no information has been provided in substantiation of the claim that the author's son was in fact denied the right to legal assistance in the preparation of his defence at trial. Accordingly, this claim is also inadmissible under article 2 of the Optional Protocol.

6.7 The Committee considers there to be no impediment to the admissibility of the author's remaining claims under articles 7, 9, paragraph (3), and 14, paragraphs (3) (b) and (3) (g), and proceeds to consider them on the merits.

Consideration of the merits

7.1 The Human Rights Committee has considered the present communication in the light of all the information made available to it by the parties, as provided under article 5, paragraph 1, of the Optional Protocol. It notes that, whilst the State party has provided comments on the author's son's criminal case and conviction, including information about the commutation of the death sentence, it has not provided any information about the substance of the claims advanced by the author. The State party merely notes that Mr. Boimurodov was tried and convicted for certain offences; it does not address the author's substantive allegations of Covenant violations.

7.2 In relation to the author's claims that his son's rights under articles 7 and 14, paragraph (3) (g) were violated by the State party, the Committee notes that the author has made detailed submissions which the State party has not addressed. The Committee recalls that it is implicit in article 4, paragraph 2, of the Optional Protocol that a State party should examine in good faith all allegations brought against it, and should provide the Committee with all relevant information at its disposal. The Committee does not consider that a general statement about the criminal proceedings in question meets this obligation. In such circumstances, due weight must be given to the author's allegations, to the extent that they have been properly substantiated. In light of the detailed information provided by the author to the effect that his son was subjected to severe pain and suffering at the hands of the State party's law enforcement officers, some of whom were subsequently charged in relation to this mistreatment, and in the absence of an explanation from the State party, the Committee considers that the case before it discloses a violation of articles 7 and 14, paragraph 3 (g) of the Covenant.

7.3 Similarly, the Committee must give due weight to the author's allegation of a violation of his son's right under article 14 (3) (b) to communicate with counsel of his choosing. In the absence of any explanation from the State party, the Committee considers that the facts as presented to it regarding the author's son being held incommunicado for a period of 40 days reveal a violation of this provision of the Covenant.

7.4 Further, the Committee recalls that the right to be brought 'promptly' before a judicial authority implies that delays must not exceed a few days, and that incommunicado detention as such may violate article 9, paragraph 3.[4] In the present case, the author's son was detained incommunicado for 40 days. In the absence of any explanation from the State party, the Committee considers that the circumstances disclose a violation of article 9, paragraph 3.

8. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts before it disclose violations of articles 7, 9, paragraph (3), and 14, paragraphs (3) (b) and (g) of the Covenant.

9. Pursuant to article 2, paragraph 3 (a), of the Covenant, the Committee considers that the author's son is entitled to an appropriate remedy, including adequate compensation.

10. By becoming a State party to the Optional Protocol, the State party has recognized the competence of the Committee to determine whether there has been a violation of the Covenant or not; pursuant to article 2 of the Covenant, the State party has undertaken to ensure all individuals within its territory or subject to its jurisdiction the rights recognized in the Covenant, and to provide an effective and enforceable remedy in cases where a violation has been established. The Committee wishes to receive from the State party, within 90 days, information about the measures taken to give effect to the Committee's views. The State party is also requested to publish the Committee.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the Committee's annual report to the General Assembly.]

Notes

[1] The Covenant and the Optional Protocol entered into force in relation to Tajikistan on 4 April 1999.

[2] Given the stage this issue was raised by the author, the Committee decides not to deal with this claim.

[3] See communication No. 541/1993, *Errol Simms v. Jamaica*, Inadmissibility decision adopted on 3 April 1995, para. 6.2.

[4] Communication No. 277/1988, *Teran Jijon v. Ecuador*, Views adopted on 26 March 1992, at para. 5.3; communication No. 1128/2002, *Rafael Marques de Morais v. Angola*, Views adopted on 29 March 2005, para. 6.3.

P. Communication No. 1044/2002, *Nazriev v. Tajikistan* (Views adopted on 17 March 2006, eighty-sixth session)*

Submitted by:	Davlatbibi Shukurova (not represented by counsel)
Alleged victims:	The author's husband Dovud and his brother Sherali Nazriev, deceased
State party:	Tajikistan
Date of communication:	26 December 2001 (initial submission)
Subject matter:	Torture, unfair trial, unlawful detention
Substantive issues:	Death sentence pronounced and executed after unfair trial
Procedural issues:	Level of substantiation of claim
Articles of the Covenant:	2, paragraph 3; 6; 7; 9; 14 paragraphs 1, 3 (b), (d), (e), (f), (g), and (5)
Article of the Optional Protocol:	2

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 17 March 2006,

Having concluded its consideration of communication No. 1044/2002, submitted to the Human Rights Committee by Davlatbibi Shukurova under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the author of the communication, and the State party,

Adopts the following:

Views under article 5, paragraph 4, of the Optional Protocol

1.1 The author of the communication is Davlatbibi Shukurova, a Tajik national born in 1973. She submits the communication on behalf of her husband, Dovud Nazriev, and on behalf of his brother, Sherali Nazriev, both deceased, who, at the time of submission of the communication, were awaiting execution following a death sentence pronounced by the Supreme Court on 11 May 2000. She claims that the brothers are victims of violation by Tajikistan, of their rights under articles 6; 7; 9; and 14, paragraphs 1, 3 (b), (d), (e), (f), (g), and 5, of the Covenant.[1] The communication also appears to raise issues under article 7 in relation to the author herself. She is not represented.

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* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Nisuke Ando, Mr. Prafullachandra Natwarlal Bhagwati, Ms. Christine Chanet, Mr. Maurice Glèlè Ahanhanzo, Mr. Edwin Johnson, Mr. Walter Kälin, Mr. Ahmed Tawfik Khalil, Mr. Rajsoomer Lallah, Mr. Michael O'Flaherty, Ms. Elisabeth Palm, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Ivan Shearer, Mr. Hipólito Solari-Yrigoyen, Ms. Ruth Wedgwood and Mr. Roman Wieruszewski.

1.2 On 9 January 2002, pursuant to rule 92 (old 86) of its rules of procedure, the Human Rights Committee, acting through its Special Rapporteur on new communications and interim measures, requested the State party not to carry out the execution of the brothers while their case is being examined by the Committee. This request was reiterated on 1, 9, and 10 July 2002. On 23 July 2002, the author informed that her husband and his brother were executed on 11 July 2002.

Factual background

2.1 On 16 February 2000, at around 5 p.m. a remote-controlled bomb exploded in the centre of Dushanbe. The target of the explosion was the Mayor of Dushanbe. The Mayor was injured, while the Deputy-Minister of Security, who was standing next to him, was killed.

2.2 Sherali Nazriev was interrogated in relation to the bombing on 19 February 2000 as a suspect. He was arrested immediately after the interrogation, and on 25 February 2000, he was charged with the bombing. On 25 April 2000, the author's husband, Dovud, was called for interrogation to the Ministry of Security; he was arrested the same day. He was allegedly detained in the basement of the Ministry of Security until 28 May 2000, when he was transferred to an Investigation Detention Centre (SIZO). His arrest was allegedly authorized by a prosecutor only on 29 May 2000, and he was charged with the bombing the same day.

2.3 The brothers were allegedly tortured to force them to confess guilt during the month following their arrests. The author contends that the acts of torture included beatings and kicks with batons. The brothers were hung up and were administrated kicks to their kidneys. Under torture, they confessed in writing to having committed the bombing. Sherali, as a security guard in the Mayor's Office, was accused of placing the explosive in the Mayor's car, and Dovud, who was allegedly standing nearby, activated the bomb when the Mayor and the deputy Minister went to the car. Allegedly, shortly after their confessions, the investigators began placing cords, soap, and razor blades in their cells, to incite them to commit suicide.

2.4 The author claims that the brothers' relatives were given no information about their whereabouts for several months, and they were not allowed to visit them or to send parcels to them. Allegedly, she saw her husband only in July 2000, during a confrontation in the investigator's office; she was allowed to meet "officially" with him only in September 2000.

2.5 Allegedly, while detained in the premises of the Ministry of Security, Dovud was not allowed to be represented by a lawyer. As Sherali was not provided with a State-appointed lawyer, his family hired a private lawyer in March 2000, but he was allowed to see him only in August 2000; even then, the lawyer was allegedly prevented from meeting with his client in private.

2.6 The case was heard by the Military Chamber of the Supreme Court[2] (sitting in first instance), from 26 March to 11 May 2001. On 11 May 2001, the Military Chamber of the Supreme Court sentenced the brothers to death. According to the author, the trial was biased and not objective. In particular:

(a) One of the judges was not an ethnic Tajik and allegedly could not speak Tajik properly; but he was not provided with an interpreter;

(b) In court, the brothers retracted their confessions, objecting that they had been signed under duress. According to the author, Sherali had no possibility to place the bomb in the car, because it was parked in front of the entrance to the Mayor's Office, and many people were passing there, while on the day of the crime Dovud was sick and stayed at home;

(c) Most of the brothers' requests to call defence witnesses, including an alibi witness for Dovud, were rejected by the court;

(d) Sherali's guilt was partly based on the conclusions of an expert who had examined his clothes. The author notes that the arrest was on 19 February 2000, but that the clothes were only examined in August 2000.

2.7 On 13 November 2001, the Criminal Chamber of the Supreme Court, acting as an appellate body, upheld the judgement of the Military Chamber of 11 May 2000.

The complaint

3. The author claims that the facts set out above amount to a violation of the rights of Sherali and Dovud Nazriev under articles 6; 7; 9; and 14, paragraphs 1, 3 (b), (d), (e), (f), (g), and 5 of the Covenant. Although the author does not specifically invoke article 7 in her own respect, the communication also appears to raise issues under this provision.

State party's observations on admissibility and merits

4.1 The State party presented comments on 9 July 2002, without however addressing the Committee's request for interim measures for protection. It states that the brothers were sentenced to death for a serious terrorist act. To achieve their plan and objectives, they acted on a preliminary agreement with an unidentified person. Sherali joined the police and became a security guard in the Municipality of Dushanbe. On 16 February 2000, during lunch break, he placed a bomb in the Mayor's car and informed his brother. Dovud observed the car and when the Mayor came in, accompanied by the deputy Minister of Internal Affairs, detonated the bomb.

4.2 The court found the brothers guilty of other crimes as well, e.g. fraud committed in 1999 (illegal transfer of property of a car). Sherali was sentenced for unlawfully crossing of the Tajik-Afghan border in 1995, Dovud for dissemination of US$ 4,000 counterfeit and for participation in a robbery in 1999.

4.3 According to the State party, the brothers' guilt was fully established on the basis of their confessions, on the basis of witness testimony in court and depositions during the preliminary investigation, as well as on the basis of records of the examination of the crime scene, evidence seized, conclusions of forensic experts, and other evidence examined by the court.

4.4 The State party recalls that an arrest warrant against Dovud was issued on 24 May 2000. He was served the order on 29 May 2000; the same day he refused, in writing, to avail himself of the services of a lawyer. Subsequently, before being charged with particularly serious crimes, he was given an ex-officio lawyer. Sherali was arrested on 17 February 2000. During his interrogation, he was informed of his right to be represented by a lawyer but did not request one. Notwithstanding, a lawyer was assigned to him on 19 March 2000. According to the State party, the case file does not contain any record indicating that any of the above lawyers has ever complained about a refusal to meet with their clients.

4.5 The State party rejects as unfounded the author's allegations of the use of torture during preliminary investigation, arguing that the criminal case file does not contain any complaints about any beatings.

4.6 The author's allegations about the bias and partiality of the trial are rejected as groundless by the State party, because the trial was public and took place in the presence of lawyers, relatives of the accused and other individuals.

4.7 The allegation about the insufficient knowledge of Tajik by one of the court's judges is also dismissed, as the person in question adequately mastered the language. In addition, the lawyers for the Nazriev brothers did not object in court about this.

4.8 As to the alibi defence presented by Dovud, the State party notes that this was verified and dismissed during the preliminary investigation. In court, neither Dovud nor his lawyer produced documents that would buttress his alibi defence.

4.9 The State party affirms that the Military Chamber of the Supreme Court had initially sent back the case for "additional investigation", and that subsequently it decided to re-open the proceedings, and interrogated additional witnesses, listened to the pleadings of the prosecution and the lawyers. The judgement was pronounced in accordance with the requirements of the Criminal Procedure Code then into force.

4.10 The State party affirms that the author's allegations were all examined and dismissed on cassation.

Author's comments

5.1 On 1 September 2002, the author explained that upon registration of the case by the Committee, the State party's authorities (Presidential Office) requested the Ministry of Interior, the Prosecutor's Office, and the Supreme Court to postpone the execution of the brothers for a period of 6 months, until 10 July 2002. On 24 June 2002, the prison authorities refused to accept her parcels in SIZO No 1 Detention Centre in Dushanbe, affirming that the brothers had been transferred to the city of Kurgan-Tyube. The author tried to locate them, but the authorities did not reply to her queries, claiming that they had no relevant information. On 23 July 2002, a relative of her husband obtained two death certificates from the Dushanbe Municipality, establishing that the brothers had been executed by firing squad already on 11 July 2002.

5.2 The author recalls that Sherali's arrest in February 2000 for illegal border crossing was a cover-up designed to extract information on the bombing from him in the absence of a lawyer. She refers to article 51 of the Criminal Procedure Code, which states that where a suspect faces the death penalty, legal representation is compulsory from the moment of the indictment.

5.3 The author notes that the State party has not provided any explanation about the grounds of her husband's detention from 25 April to 24 May 2000, and adds that her husband's detention during this period could be confirmed by family members, friends, and relatives, who saw him leaving for his interrogation in the Ministry of Security and never coming back.

5.4 According to her, the brothers' lawyers had requested repeatedly to see their clients, but their requests were mostly rejected under different pretexts. The practice in Tajikistan is that a lawyer will orally request an investigator to allow him to meet his/her client; when the request is rejected, no ground is given. Such refusals are said to constitute a common practice. The author affirms that during the trial, her husband's and his brother's lawyers both complained about the limited access to their clients. The presiding judge apparently ignored these claims.

5.5 The author reaffirms that her husband and his brother were subjected to multiple acts of torture, and that their relatives were not allowed to visit them for a long period to presumably prevent them seeing the marks of torture; in court, the brothers had claimed that they were tortured, but this was ignored.

5.6 Finally, the author affirms that the court concluded that the brothers had entered into a "preliminary agreement with an unidentified person" who allegedly paid them US$ 30,000 prior to the attack, and promised to pay an additional US$ 100,000 upon completion. She argues that the family had always lived with limited financial means, and that neither the investigation nor the court found any money. She contends that the fact that the person who masterminded the crime was not identified during the investigation nor by the court shows that crucial elements and evidence of the case have not been established. This, according to the author, illustrates the bias and partiality both of the preliminary investigation, and the court.

Issues and proceedings before the Committee

Breach of the Optional Protocol

6.1 The author affirms that the State party has breached its obligations under the Optional Protocol by executing her husband and his brother despite the fact that their communication had been registered under the Optional Protocol and a request for interim measures of protection had been addressed to the State party in this respect. The Committee recalls[3] that by adhering to the Optional Protocol, a State party to the Covenant recognizes the competence of the Committee to receive and consider communications from individuals claiming to be victims of violations of any of the rights set forth in the Covenant (Preamble and article 1). Implicit in a State's adherence to the Protocol is an undertaking to cooperate with the Committee in good faith, so as to enable it to consider such communications, and after examination to forward its Views to the State party and to the individual (article 5, paragraphs 1 and 4). It is incompatible with these obligations for a State party to take any action that would prevent or frustrate the Committee in its consideration and examination of the communication, and in the expression of its Views.

6.2 Apart from any violation of the Covenant found against a State party in a communication, a State party commits grave breaches of its obligations under the Optional Protocol if it acts to prevent or to frustrate consideration by the Committee of a communication alleging a violation of the Covenant, or to render examination by the Committee moot and the expression of its Views nugatory and futile. In the present communication, the author alleges that her husband was denied rights under articles 6, 7, 9, 10 and 14 of the Covenant. Having been notified of the communication, the State party breached its obligations under the Protocol by executing the alleged victims before the Committee concluded consideration and examination of the case, and the formulation and communication of its Views. It is particularly inexcusable for the State to have done so after the Committee acted under rule 92 of its Rules of Procedure, and in spite of several reminders addressed to the State party to this effect.

6.3 The Committee recalls that interim measures pursuant to rule 92 of the Committee's Rules of Procedure adopted in conformity with article 39 of the Covenant, are essential to the Committee's role under the Protocol. Flouting of the Rule, especially by irreversible measures such as, as in the present case, the execution of Dovud and Sherali Nazriev, undermines the protection of Covenant rights through the Optional Protocol.[4]

Examination of admissibility

7.1 Before considering any claim contained in a communication, the Human Rights Committee must, in accordance with rule 93 of its rules of procedure, decide whether or not the communication is admissible under the Optional Protocol to the Covenant.

7.2 The Committee notes that the same matter is not being examined under any other international procedure, in line with the requirements of article 5, paragraph 2 (a), of the Optional Protocol.

7.3 The Committee has noted the author's claim under article 14, paragraph 3 (e), that several witnesses for Dovud Nazriev were not examined in court. The State party has contended that this allegation was duly examined during the preliminary investigation and was found to be groundless, and that the court dismissed Dovud's defence alibi as neither he nor his lawyer had provided any documents that would corroborate this alibi. The Committee notes that the above claim relates to the evaluation of facts and evidence. It recalls its jurisprudence that it is generally for the courts of States parties to the Covenant to evaluate facts and evidence in a particular case, unless it can be ascertained that it was clearly arbitrary or amounted to a denial of justice.[5] On the information before it, the Committee considers that the author has failed to substantiate sufficiently that her husband and his brother's trial in the case suffered from such defects. Accordingly, this claim is inadmissible under article 2 of the Optional Protocol.

7.4 The Committee takes note of the author's allegation under article 14, paragraph 3 (f), as one judge did not sufficiently master the Tajik language. The State party has explained that the judge in question did adequately master the language, and that neither the alleged victims nor their lawyers ever raised the issue in court; this affirmation is unchallenged by the author. In the circumstances, the Committee considers that the author did not exhaust available domestic remedies, and this part of the communication is inadmissible under article 5, paragraph 2 (b), of the Optional Protocol.

7.5 The Committee has also noted the unrefuted claim that Dovud and Sherali Nazriev's rights under article 14, paragraph 5, of the Covenant were violated. It recalls that appeal on cassation was examined on 13 November 2001 by the Criminal Chamber of the Supreme Court, acting as an appellate body of the Military Chamber, and that the composition of the appellate body was different from the initial composition of the Military Chamber. In the absence of other information in this respect, the Committee considers that the author has failed to substantiate sufficiently this claim, for purposes of admissibility. This part of the communication is thus inadmissible under article 2 of the Optional Protocol.

7.6 The Committee considers that the author's remaining claims are sufficiently substantiated, for purposes of admissibility.

Examination of the merits

8.1 The Human Rights Committee has considered the present communication in the light of all the information made available to it by the parties, as provided in article 5, paragraph 1, of the Optional Protocol.

8.2 The author claims that her husband and his brother were beaten and subjected to torture by investigators during the early stages of their detention, thus forcing them to confess guilt in the bombing; she provides details on the methods of torture used (paras. 2.3 and 2.4 above). She contends that these allegations were raised in court but were ignored. The State party merely argues that the case file does not contain complaints about mistreatment. The Committee observes that the decision of the Supreme Court's Appellate Chamber also does not address the issue. In the absence of other pertinent information in this regard, due weight must be given to the author's claims. The Committee recalls that it is essential that complaints about torture must be investigated promptly and impartially by competent authorities.[e] In the present case, no substantive refutation was made by the State party in this regard, and the Committee concludes that the treatment Dovud and Sherali Nazriev were subjected to amounts to a violation of article 7, read together with articles 14, paragraph 1 and 2, paragraph 3, of the Covenant.

8.3 In light of the above, the Committee concludes that Dovud and Sherali Nazriev's right under article 14, paragraph 3 (g), was also violated, as they were compelled to confess guilt to a crime.

8.4 The author contends that her husband was arrested on 25 April 2000 and kept in premises of the Ministry of Security until 28 May, without contact with the outside world; his arrest was endorsed by a prosecutor only on 29 May 2000, i.e. 34 days after arrest. The State party notes that an arrest warrant against Dovud was issued on 25 May 2000 and that he was indicted on 29 May 2000. In its reply, the State party has in fact not refuted the claim of unlawful detention of Dovud Nazriev for 34 days. In the circumstances of the case, the Committee concludes that Dovud Nazriev's right under article 9, paragraph 1, was violated.

8.5 On the claim that Dovud and Sherali Nazriev were unrepresented for a long period, and that once they were legally represented, their lawyers were prevented from meeting with them, the State party affirms that when Dovud was indicted on 29 May 2000, he waived his right to be represented; when he was charged with serious crimes, he was given an ex-officio lawyer;

Sherali did not request to be represented upon arrest, but was assigned a lawyer on 19 March 2000, when charged with serious crimes. The Committee recalls that, particularly in cases involving capital punishment, it is axiomatic that the accused is effectively assisted by a lawyer[7] at all stages of the proceedings. It concludes that in the circumstances of the present case, the material before it reveals a violation of the author's husband's and his brother's rights under article 14, paragraph 3 (b), and (d), of the Covenant, in that they were not provided with the opportunity adequately to prepare their defence, and were not legally represented at the initial stage of the investigation.

8.6 The Committee recalls that the imposition of a sentence of death upon conclusion of a trial in which the provisions of the Covenant have not been respected constitutes a violation of article 6 of the Covenant.[8] In the current case, the death sentences were passed and executed, in violation of the right to a fair trial, as guaranteed by article 14 of the Covenant, and therefore also in violation of article 6 of the Covenant.

8.7 The Committee finally notes the author's claim that the authorities did not inform her about her husband's and his brother's execution until 23 July 2002. The law in force in the State party still does not allow for the family of an individual under sentence of death to be informed either of the date of execution or the location of the burial site of the executed individual. The Committee understands the continued anguish and mental stress caused to the author, as the wife of a condemned prisoner, by the persisting uncertainty of the circumstances that led to his execution, as well as the location of his gravesite. It recalls that the secrecy surrounding the date of execution, and the place of burial, as well as the refusal to hand over the body for burial, have the effect of intimidating or punishing families by intentionally leaving them in a state of uncertainty and mental distress. The Committee considers that the authorities' failure to notify the author of the execution of her husband and of her brother in law, and the failure to inform her of their burial places, amounts to inhuman treatment of the author, contrary to article 7.[9]

9. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the Covenant, is of the view that the facts before it disclose a violation

(a) Of articles 6; 7; 9, paragraph 1; and 14, paragraphs 1 and 3 (b), (d), and (g), of the Covenant in relation to Dovud and Sherali Nazriev; and

(b) Of article 7 in relation to the author herself.

10. In accordance with article 2, paragraph 3 (a), of the Covenant, the State party is under an obligation to provide Mrs. Shukurova with an effective remedy, including appropriate compensation, and to disclose to her the burial site of her husband and her husband's brother. The State party is also under an obligation to prevent similar violations in the future.

11. Bearing in mind that, by becoming a party to the Optional Protocol, the State party has recognized the competence of the Committee to determine whether there has been a violation of the Covenant or not and that, pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory or subject to its jurisdiction the rights recognized in the Covenant and to provide an effective and enforceable remedy in case a

violation has been established, the Committee wishes to receive from the State party, within 90 days, information about the measures taken to give effect to the Committee's Views. The State party is also requested to publish the Committee's Views.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the Committee's annual report to the General Assembly.]

Notes

[1] The Covenant and the Optional Protocol entered into force for the State party on 4 April 1999.

[2] The trial was held before the Military Chamber of the Court, as Sherali Nazriev was a military officer.

[3] See *Piandiong v. the Philippines*, communication No. 869/1999, Views adopted on 19 October 2000, paras. 5.1 to 5.4.

[4] See, *Saidov v. Uzbekistan*, communication No. 964/2001, Views adopted on 8 July 2004.

[5] See communication No. 541/1993, *Errol Simms v. Jamaica*, Inadmissibility decision adopted on 3 April 1995, para. 6.2.

[6] See general comment No. 20 (on article 7), forty-fourth session (1992), para. 14.

[7] See, for example, *Aliev v. Ukraine*, communication No. 781/1997, Views adopted on 7 August 2003, para. 7.3.

[8] See, for example, *Kurbanov v. Tajikistan*, communication No. 1096/2002, Views adopted on 6 November 2003, para. 7.7.

[9] See, for example, *Aliboev v. Tajikistan*, communication No. 985/2001, Views adopted on 18 October 2005, para. 6.7.

Q. Communication No. 1050/2002, *D. and E. v. Australia* (Views adopted on 11 July 2006, eighty-seventh session)*

Submitted by:	D and E, and their two children (represented by counsel, Nicholas Poynder)
Alleged victim:	The authors
State party:	Australia
Date of communication:	1 February 2002 (initial submission)
Subject matter:	Immigration detention, rights of the child
Procedural issues:	None
Substantive issues:	Arbitrary detention
Articles of the Covenant:	7, 9 (1), 9 (4) and 24 (1)
Articles of the Optional Protocol:	2, 5 (2) (b)

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 11 July 2006,

Having concluded its consideration of communication No. 1050/2002, submitted to the Human Rights Committee on behalf of D and E, and their two children under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the authors of the communication, and the State party,

Adopts the following:

Views under article 5, paragraph 4, of the Optional Protocol

1.1 The authors of the communication are D, born on 15 December 1970, E, born on 1 July 1968, and their two children born on 25 April 1995 and 5 May 1999, all Iranian nationals, currently living in Australia. They claim to be victims of violations of articles 7, 9 (1), 9 (4) and 24 (1) of the International Covenant on Civil and Political Rights. They are represented by counsel, Nicholas Poynder. The Optional Protocol entered into force for Australia on 25 December 1991.

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* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Nisuke Ando, Mr. Prafullachandra Natwarlal Bhagwati, Ms. Christine Chanet, Mr. Edwin Johnson, Mr. Walter Kälin, Mr. Ahmed Tawfik Khalil, Mr. Rajsoomer Lallah, Mr. Michael O'Flaherty, Ms. Elisabeth Palm, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Hipólito Solari-Yrigoyen and Mr. Roman Wieruszewski.

Pursuant to rule 90 of the Committee's rules of procedure, Committee member Mr. Ivan Shearer did not participate in the adoption of the present decision.

1.2 On 12 February 2002, the Committee, acting through its Special Rapporteur on new communications, pursuant to rule 92 of the Committee's rules of procedure, requested the State party "to provide information to the Committee, on an urgent basis, of whether the authors are under a real risk of deportation while their communication is being considered by the Committee". It added that it trusts the State party "will not deport the authors before the Committee has received such information and had an opportunity to consider whether the request for interim measures should be granted". By note verbale of 12 April 2002, the State party replied that it was in the process of considering the request for information by the Special Rapporteur on the possibility of whether there is a real risk of removal of the authors from Australia while the Committee considers the communication and announced that it will not remove the authors until the request has been considered.

Facts as presented by the authors

2.1 The authors arrived by boat from Iran, travelling via Pakistan, Malaysia and Indonesia, in November 2000. They arrived in Australia without the required travel documents and were therefore immediately taken into detention under section 189 of the Migration Act 1958 which requires all "unlawful non-citizens" to be placed in immigration detention. They were detained at the Curtin immigration detention centre (near Derby, in Western Australia), with the nearest major city, Perth, being approximately 1,800 kilometres to the south.

2.2 On 12 November 2000, they applied for asylum. The principal asylum applicant was D. She claims that she had been involved in illegal activities in Isfahan, Iran, between 1992 and 2000. She worked for a man involved in making pornographic movies in Isfahan and did the make-up for the women involved. In 1993, she was arrested because there had been women in her hairdressing salon with make-up and dresses they were not allowed to wear. She was interrogated and beaten, then imprisoned for one month. Subsequently, she moved to a village outside Isfahan, where she continued to work for the same man for seven years. During that time, E was repeatedly arrested and questioned regarding his wife, whom he could only see infrequently and secretly. One day in July 2000, one of the security guards from the prison came to the hairdressing salon and recognized D, who then decided to leave Iran.

2.3 On 11 December 2000, a delegate of the Minister for Immigration rejected the authors' asylum application. On 19 February 2001, their application for review of this decision was refused by the Refugee Review Tribunal (RRT). The RRT did not consider that D's fear of being punished upon her return to Iran by reason of her involvement in making pornographic films brought her within the refugee definition contained in the 1951 Convention. While the RRT accepted that the death penalty was applicable in Iran to the creation, duplication and distribution of pornographic films or obscene videos, it considered that persecution would not take place on account of one of the five reasons enumerated in the refugee definition. In particular, it rejected the possibility that D might be persecuted on account of her membership of a "particular social group" as constituted by "people involved in making pornographic films".

2.4 Under section 417 of the Migration Act, the Minister for Immigration can exercise his discretion to substitute a decision of the RRT with a more favourable decision if "it is in the public interest to do so".[1] Requests were made to the Minister to exercise his discretion on 10 July and 10 August 2001. In these requests, D now claimed that she had acted in pornographic movies. The authors were not re-interviewed in relation to their requests, nor were the findings of fact by the RRT disputed by the Minister. On 24 September 2001, the Minister for Immigration decided not to exercise his discretion under section 417.

2.5 In 2003, the Minister referred the case back to the primary decision-maker to re-determine the asylum application. On 2 October 2003, the application was again rejected. On 22 January 2004, the authors were released from detention. On 17 May 2004, their application for review of the second refusal decision was rejected by the RRT. The authors were granted Global Special Humanitarian visas on 13 March 2006.

The complaint

3.1 The authors submit that their prolonged detention is a breach of article 9, paragraphs 1 and 4, of the Covenant, as they were detained upon arrival under the provisions of section 189 (1) of the Migration Act. These provisions do not provide for any review of detention, either by judicial or administrative means. They submit that their circumstances are no different in principle to those in the case of *A. v. Australia*.[2] No justification for their detention was ever provided to them. Similarly, while the authors were held under differing provisions than in that case, the effect of the relevant legislation in the present case is the same, to the extent there is no provision for them to be able to make an effective application for review of their detention by a court. They seek compensation for their detention under article 2, paragraph 3.[3]

3.2 The authors claim that the prolonged detention of the two minor children violates article 24, paragraph 1. Both are young, the eldest was born in 1993, the youngest in 1999. They invoke general comment No. 17/35 of 5 April 1989 in which the Committee states that the Covenant requires "the adoption of special measures to protect children, in addition to the measures that States are required to take under article 2 to ensure that everyone enjoys the rights provided for in the Covenant". The authors argue that there was no justification provided for the prolonged detention of the children, and that no consideration was given to whether it is in their best interests to have spent over three years in an isolated detention facility. They argue that it is no answer to say that the best interests of the children were served by keeping them with their parents.

3.3 On 11 April 2006, counsel informed the Committee that the authors had obtained a temporary protection visa and that there was thus no need to proceed with the communication in relation to article 7. However, the authors wished to maintain the communication before the Committee in relation to articles 9 and 24 in light of their prior unlawful detention.

State party's submissions on admissibility and merits and authors' comments

4.1 By note verbale of 12 April 2002, the State party challenged the admissibility of the communication on the ground that counsel was not authorized by the authors to lodge the communication on their behalf. By letter dated 9 May 2002, counsel provided the written authorisation from the authors to submit the communication on their behalf.

4.2 By note verbale of 23 September 2002, the State party commented on the admissibility and merits of the communication. With regard to the alleged violation of article 9, paragraph 1, it argues that the prohibition against the deprivation of liberty is not absolute since the *travaux préparatoires* show that the drafters explicitly contemplated detention of non-citizens for immigration control as an exception to the general prohibition. Furthermore, it argues that the term "law" refers to law in the domestic legal system and that detention must be not only lawful, but reasonable in all the circumstances.[4] It recalls that there is no indication in the Committee's jurisprudence that detention for a particular length of time could be considered arbitrary *per se*. It also recalls that detention of unauthorized arrivals is not arbitrary *per se*, and that the main test is whether the detention is reasonable, proportionate, appropriate and justifiable in all the circumstances.[5] With regard to the present case, it argues that the claim is without merit. It explains that detention of unauthorized arrivals allows for an assessment of whether the person has a lawful right to remain in the country and for checks to be completed before the person is permitted access to the general community. Detention is thus for administrative, not correctional purposes. The authors were placed in immigration detention in accordance with section 189 (1) of the Migration Act. The State party argues that their detention was not arbitrary since their initial detention was proportionate to the objective sought, namely to allow the authorities to process their asylum application and for the Refugee Review Tribunal and Minister to review this decision. It argues further that the circumstances leading to their detention has been subject to review, by both the Refuge Review Tribunal and Minister, but the decision to deny the authors a visa was confirmed and the authors remained in detention, pending their removal from the country. Consequently, the detention of the authors was reasonable and necessary in all the circumstances.

4.3 With regard to the alleged violation of article 9, paragraph 4, the State party argues that there is nothing apparent in the Covenant that "lawful" was intended to mean "lawful in international law" or "not arbitrary". Furthermore, it argues that there is nothing in the Committee's general comments or the *travaux préparatoires* that supports the finding that lawfulness in article 9, paragraph 4, extends beyond domestic law. It notes that where the term "lawful" is used in other provisions of the Covenant, for instance articles 9 (1), 17 (2), 18 (3) and 22 (2), it clearly refers to domestic law. With regard to the present case, the State party argues that the claim has not been sufficiently substantiated, for purposes of determining admissibility. It recalls that, under domestic law, the authors could have tested the lawfulness of their detention before the High Court or the Federal Court, either by seeking *habeas corpus* or by invoking the original jurisdiction of the High Court under section 75 of the Constitution to obtain an appropriate remedy. Moreover, at the time of the decision to deny a Protection Visa to D, section 476 of the Migration Act allowed her to seek Federal court review of that decision. Any review of the status of the authors as unlawful non-citizens would effectively also determine the legality of their detention and could have resulted in their release from detention. For the State party, the communication does not address the issue of why the authors did not pursue this course of action, nor does it explain why they do not represent effective avenues for the review of the legality of the authors' detention. In the alternative, it argues that the claim is inadmissible under article 2 and 5 (2) (b) of the Optional Protocol, as the authors have not exhausted domestic remedies. It recalls that according to the Committee's jurisprudence, if a remedy of *habeas corpus* is available, a person who fails to take advantage of this right cannot be said to have been denied the opportunity to have the lawfulness of his or her detention reviewed in court without delay.[6] In the present case, the authors did not explain their failure to seek a writ of *habeas corpus* or pursue potential remedies under section 75 of the Constitution.

4.4 If the claim under article 9, paragraph 4, is found to be admissible, the State party argues that it is without merit, because the authors could have tested the legality of their detention in the High Court or the Federal Court by seeking *habeas corpus* or other appropriate remedy. It submits that mandatory detention of the authors did not mean that the Court was not able to effectively review their detention and order their release if the detention was unlawful. It reiterates that any review of the status of the authors as unlawful non-citizens would also have determined the legality of their detention. It recalls that it was possible to seek judicial review of the decision of the Refugee Review Tribunal in the Federal Court, but that D did not seek such review because there was no identifiable error of law. The State party submits that the fact that the decision could have been subjected to judicial review meant that the obligation under article 9, paragraph 4, was satisfied in relation to the authors.

4.5 With regard to the alleged violation of article 24, paragraph 1, the State party invokes general comment No. 17/35 of 5 April 1989 and argues that States parties have a broad discretion with regard to the particular manner in which they implement their duty of protection towards children. It recalls that section 189 of the Migration Act requires the mandatory detention of all unlawful non-citizens, including children. With regard to the present case, it argues that the claim is without merit, as it has fulfilled its obligation to provide the two children with "such measures of protection as are required" by their status as minors. It explains that the immigration detention standards for children require that social and educational programmes appropriate to the child's age and abilities be available through the detention facilities. D had indicated that she wished one of her children to attend the local school and was encouraged to assist the child in meeting the minimum entry requirements set by the school. Children can access and utilise a range of services in detention centres, such as television, videos and video games, sporting and playground equipment, and toys and games. Excursions are also organized outside the centres, including trips to local tourist attractions, etc. It also recalls that when a child is admitted to an immigration detention facility with a parent, a centre nurse interviews the child and the parent to determine the special needs of the child. This process of induction may also include interviews by a counsellor or psychologist. Children are provided with necessary medical or other health care, including psychiatric care and referral to specialists, when required. For instance, on 4 April 2002, the Centre Management responded to concerns expressed by D that one of her children had developed a speech impediment, and he was referred to a speech pathologist who had several sessions with him. The Centre Management also responded to the recommendation of the speech pathologist that the child would benefit from sessions with a counsellor or psychologist.

4.6 As to the authors' argument that article 24 should be applied in a similar way to the obligations set out in the Convention on the Rights of the Child, and that detention of the children is not in their best interests, the State party recalls that the obligations under the Convention on the Rights of the Child cannot be the subject of a communication to the Committee. It submits that, when viewed as a whole, the detention of the children is consistent with article 24. Not detaining unlawful non-citizens who travel with children would undermine the legitimate aims of Australia's system of immigration detention. Although children in immigration detention can be released into the community on a Bridging Visa, it will not generally be in the best interests of a child to be separated from their parents or family.

Authors' comments

5. By letter of 12 January 2004, the authors noted that they did not wish to comment on the State party's submissions.

Issues and proceedings before the Committee

Consideration of admissibility

6.1 Before considering any claim contained in a communication, the Human Rights Committee must, in accordance with article 93 of its rules and procedures, decide whether or not it is admissible under the Optional Protocol of the Covenant.

6.2 The Committee has ascertained that the same matter is not being examined under another procedure of international investigation or settlement for the purposes of article 5, paragraph 2 (a), of the Optional Protocol.

6.3 As to the authors' claims under article 9, the Committee notes that the State party's highest court has determined that mandatory detention provisions are constitutional. Consequently, the Committee observes, as it has done previously, that as the State party's law provides for mandatory detention of unlawful arrivals, a *habeas corpus* application could only test whether the individuals in fact possess that (uncontested) status, rather than whether the individual detention is justified. Accordingly, the proposed remedy has not been shown to be an effective one, for the purposes of the Optional Protocol. The Committee is thus not precluded under article 5, paragraph 2 (b) of the Optional Protocol from considering this part of the communication.[7]

6.4 As to the claim under article 24, the Committee notes the State party's argument that the best interests of the authors' children were best served by being held together with their parents. The Committee considers, in the light of the State party's explanation of the efforts undertaken to provide children with appropriate educational, recreational and other programmes, including outside the facility, that a claim of violation of their rights under article 24 has, in the circumstances, been insufficiently substantiated, for purposes of admissibility.

Consideration of the merits

7.1 The Human Rights Committee has considered the present communication in the light of all the information made available to it, as provided under article 5, paragraph 1 of the Optional Protocol.

7.2 With regard to the claim of arbitrary detention, contrary to article 9, paragraph 1, the Committee recalls its jurisprudence that, in order to avoid any characterization of arbitrariness, detention should not continue beyond the period for which a State party can provide appropriate justification. It observes that the authors were detained in immigration detention for three years and two months. Whatever justification there may have been for an initial detention, for instance for purposes of ascertaining identity and other issues, the State party has not, in the Committee's opinion, demonstrated that their detention was justified for such an extended period. It has not demonstrated that other, less intrusive, measures could not have achieved the same end of compliance with the State party's immigration policies by resorting to, for example, the imposition of reporting obligations, sureties or other conditions which would take into account the family's particular circumstances. As a result, the continuation of immigration detention for the authors, including two children, for the length of time described above, without any appropriate justification, was arbitrary and contrary to article 9, paragraph 1, of the Covenant.[2]

7.3 In view of the finding of a violation of article 9, paragraph 1, the Committee is of the opinion that it is not necessary to consider other arguments relating to a violation of article 9, paragraph 4.

8. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts before it reveal a violation by the State party of article 9, paragraph 1, of the Covenant.

9. In accordance with article 2, paragraph 3, of the Covenant, the State party is under an obligation to provide the authors with an effective remedy, including appropriate compensation. The State party is also under an obligation to take measures to prevent similar violations in the future.

10. Bearing in mind that, by becoming a party to the Optional Protocol, the State party has recognized the competence of the Committee to determine whether there has been a violation of the Covenant or not and that, pursuant to article 2 of the Covenant, that State party has undertaken to ensure all individuals within its territory or subject to its jurisdiction the rights recognized in the Covenant and to provide an effective and enforceable remedy in case a violation has been established, the Committee wishes to receive from the State party, within 90 days, information about the measures taken to give effect to the Committee's Views. The State party is also requested to publish the Committee's Views.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the Committee's annual report to the General Assembly.]

Notes

[1] The Ministerial Guidelines for the identification of unique or exceptional cases where it may be in the public interest to substitute a more favourable decision, provided by the authors, state that "public interest" factors may arise in a number of circumstances, including where there are circumstances that provide a sound basis for a significant threat to a person's personal security, human rights or human dignity upon return to their country of origin, where there are circumstances that may bring the State party's obligations under the Covenant, the Convention on the rights of the child or the Convention against torture and other cruel, inhuman or degrading treatment or punishment into consideration, or where there unintended but particularly unfair or unreasonable consequences of the legislation.

[2] Communication No. 560/1993, *A. v. Australia*, Views adopted on 3 April 1997, paras. 9.2 to 9.5.

[3] Ibid., para. 11.

[4] Communication No. 305/1988, *Alphen v. The Netherlands*, Views adopted on 23 July 1990, para. 5.8.

[5] Communication No. 560/1993, *A. v. Australia*, Views adopted on 3 April 1997, paras. 9.2 and 9.3.

[6] Communication No. 373/1989, *Stephens v. Jamaica*, Views adopted on 18 October 1995, para. 9.7.

[7] See communication No. 900/1999, *C. v. Australia*, Views adopted on 28 October 2002, para. 7.4; communication No. 1014/2001, *Baban and Baban v. Australia*, Views adopted on 6 August 2003, para. 6.6; and communication No. 1069/2002, *Bakhtiyari et al. v. Australia*, Views adopted on 29 October 2003, para. 8.2.

[8] See communication No. 560/1993, *A. v. Australia*, Views adopted on 3 April 1997, para. 9.4; communication No. 900/1999, *C. v. Australia*, Views adopted on 28 October 2002, para. 8.2; communication No. 1014/2001, *Baban and Baban v. Australia*, Views adopted on 6 August 2003, para. 7.2; and communication No. 1069/2002, *Bakhtiyari and al. v. Australia*, Views adopted on 29 October 2003, para. 9.3.

R. Communication No. 1054/2002, *Kříž v. Czech Republic* (Views adopted on 1 November 2005, eighty-fifth session)*

Submitted by:	Mr. Zdeněk Kříž (not represented by counsel)
Alleged victim:	The author
State party:	The Czech Republic
Date of communication:	28 September 2001 (initial submission)
Substantive issues:	Discrimination on grounds of citizenship
Procedural issues:	None
Articles of the Covenant:	26

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 1 November 2005,

Having concluded its consideration of communication No. 1054/2002, submitted to the Human Rights Committee on behalf of Mr. Zdeněk Kříž under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the author of the communication, and the State party,

Adopts the following:

Views under article 5, paragraph 4, of the Optional Protocol

1. The author of the communication is Zdeněk Kříž, a U.S. and Czech citizen, born in 1916 in Vysoké Mýto, Czech Republic, currently residing in the United States. He claims to be a victim of a violation by the Czech Republic[1] of article 26 of the International Covenant on Civil and Political Rights (the Covenant). He is not represented by counsel.

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* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Nisuke Ando, Mr. Prafullachandra Natwarlal Bhagwati, Ms. Christine Chanet, Mr. Edwin Johnson, Mr. Walter Kälin, Mr. Ahmed Tawfik Khalil, Mr. Rajsoomer Lallah, Mr. Michael O'Flaherty, Ms. Elisabeth Palm, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Hipólito Solari-Yrigoyen and Mr. Roman Wieruszewski.

Pursuant to rule 90 of the Committee's rules of procedure, Committee member Mr. Ivan Shearer did not participate in the adoption of the present decision.

Factual background

2.1 Before 1948, the author lived in Prague where he owned 1/6th of an apartment building and a business. In 1958, he was ordered to close his business and to join a cooperative which took over his equipment, without any compensation paid to him. In the early 1960s, the author, under pressure, "donated" his 1/6th apartment building to the State. In 1968, he left with his wife and two sons for Austria and subsequently emigrated to the United States. In 1974, a Czechoslovak court sentenced the author, his wife and his elder son, *in absentia*, to 18 months imprisonment for leaving the country. On 16 April 1974, the author became a US citizen. By virtue of a Naturalisation Treaty between the USA and Czechoslovakia from 1928, he consequently lost his Czech citizenship.

2.2 On 1 February 1991, Act 87/1991 on Extra-Judicial Rehabilitation was adopted by the Czech Government. It spelled out the conditions for recovery of property for persons whose property had been confiscated under the Communist rule. Under the Act, a person claiming restitution of property had to be, inter alia, (a) a Czech-Slovak citizen and (b) a permanent resident in the Czech Republic, to claim entitlement to recover his or her property. These requirements had to be fulfilled during the time period in which restitution claims could be filed, between 1 April and 1 October 1991. A judgement of the Czech Constitutional Court of 12 July 1994 (No. 164/1994), however, annulled the condition of permanent residence and established a new time frame for the submission of restitution claims by persons who had thereby become entitled persons, running from 1 November 1994 to 1 May 1995. In 1995, the author applied for Czech citizenship, which he obtained on 28 July 1995, i.e. after the expiry of the deadline for applications for restitution.

2.3 On 14 April 1995, the author lodged a claim for restitution of property to the owner of the apartment building, the State Housing Enterprise in Prague 4, which did not accede to his request, because he did not fulfil the condition of Czech citizenship in the stipulated time period. He brought his case before the District Court of Prague 4, which rejected the restitution claim on 27 April 1998, on the ground that he did not fulfil the citizenship requirement during the period in which the new restitution claims could be made (which ended on 1 May 1995). The Court did not consider whether he met the other conditions necessary for establishing entitlement for recovery of his property. On 3 December 1998, the Municipal Court in Prague confirmed the decision of the District Court, stating that the author would have had to fulfil the citizenship condition at the latest at the end of the initial period open for claims, i.e. on 1 October 1991, to be an "entitled person". On 25 July 2000, the Constitutional Court confirmed the decision on the same grounds. The author thus claims to have exhausted domestic remedies.

The complaint

3. The author claims to be a victim of a violation of article 26 of the Covenant, as the citizenship requirement of Act 87/1991 constitutes unlawful discrimination.

The State party's submission on the admissibility and merits of the communication and author's comments

4.1 On 9 January 2003, the State party commented on the admissibility and merits of the communication. It concedes that the author has exhausted all available domestic remedies, and does not challenge the admissibility of the communication. On a factual issue, the State party indicates that the author only obtained Czech citizenship on 25 September 1997.

4.2 On the merits, the State party refers to its earlier submissions in similar cases, and indicates that its restitutions laws, including Act 87/1991, were designed to achieve the purpose of mitigating the consequences of injustices which occurred during the communist regime, while being aware that these injustices can never be remedied in full.

4.3 The State party adopts the position spelled out in judgement No. 185/1997 of the Constitutional Court, according to which:

> *"the International Covenant on Civil and Political Rights stipulates the principle of equality in its Article 2, para. 1 and its Article 26. The right to equality stipulated in Article 2 is of the accessory nature; e.g. it applies only in conjunction with another right enshrined in the Covenant. The Covenant does not contain the right to property. Article 26 stipulates the equality before the law and the prohibition of discrimination. Citizenship is not listed among the demonstrative enumeration of the grounds on which discrimination is prohibited. The Human Rights Committee repeatedly admitted differentiation based on reasonable and objective criteria. The Constitutional Court considers the consequences of Article 11 para. 2 of the Charter of Fundamental Rights and Freedoms[2] as well as the objectives of the restitution legislation and also the legislation concerning the citizenship as being such reasonable and objective criteria."*

The State party confirms that it does not intend to change its position about the condition of citizenship in the legislation: changing the conditions laid down in the restitution law at this stage would influence the economic and political stability, and destabilise the legal environment, of the Czech Republic.

4.4 On 6 May 2004, the author commented on the State party's submissions. He reiterates his initial claims and states that his case is similar to cases already considered by the Committee, in particular the cases of *Simunek*, *Adam* and *Blazek*,[3] in which the Committee found a violation by the State party of article 26.

4.5 He further refers to laws which overturned all Communist verdicts of confiscation (Law 119/1990) and to Constitutional Court decisions in other cases, finding that the confiscation verdicts were null and void and that the original ownership had never been lost.

Issues and proceedings before the Committee

Consideration of admissibility

5. Before considering any claim contained in a communication, the Human Rights Committee must, in accordance with rule 93 of its Rules of Procedure, decide whether or not the communication is admissible under the Optional Protocol to the Covenant.

6. The Committee has noted that the State party concedes to the admissibility of the complaint and decides that the communication is admissible in as far as it appears to raise issues under article 26 of the Covenant.

Consideration of the merits

7.1 The Human Rights Committee has considered the present communication in the light of all the information made available to it by the parties, as provided in article 5, paragraph 1, of the Optional Protocol.

7.2 The issue before the Committee is whether the application to the author of Act 87/1991 amounted to discrimination, in violation of article 26 of the Covenant. The Committee reiterates its jurisprudence that not all differentiations in treatment can be deemed to be discriminatory under article 26. A differentiation which is compatible with the provisions of the Covenant and is based on objective and reasonable grounds does not amount to prohibited discrimination within the meaning of article 26.[4] Whereas the citizenship criterion is objective, the Committee must determine whether its application to the author was reasonable in the circumstances of his case.

7.3 The Committee recalls its Views in the cases of *Adam, Blazek* and *Marik*,[5] where it held that article 26 had been violated. Taking into account that the State party is itself responsible for the departure of the author and his family from Czechoslovakia in seeking refuge in another country where he eventually established permanent residence and obtained a new citizenship, the Committee considers that it would be incompatible with the Covenant to require the author to satisfy the condition of Czech citizenship for the restitution of his property or alternatively for compensation.

7.4 The Committee considers that the precedent established in the above cases also applies to the author of the present communication, and that the application by the domestic courts of the citizenship requirement violated his rights under article 26 of the Covenant.

8. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol, is of the view that the facts before it disclose a violation of article 26 of the Covenant.

9. In accordance with article 2, paragraph 3 (a), of the Covenant, the State party is under an obligation to provide the author with an effective remedy, which may be compensation if the property cannot be returned. The Committee reiterates that the State party should review its legislation to ensure that all persons enjoy both equality before the law and equal protection of the law.

10. Bearing in mind that, by becoming a party to the Optional Protocol, the State party has recognized the competence of the Committee to determine whether there has been a violation of the Covenant or not, and that, pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory or subject to its jurisdiction the rights recognized in the Covenant and to provide an effective and enforceable remedy in case a violation has been established, the Committee wishes to receive from the State party, within 90 days, information about the measures taken to give effect to the Committee's views.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently to be issued in Arabic, Chinese and Russian as part of the Committee's annual report to the General Assembly.]

Notes

[1] The Covenant was ratified by Czechoslovakia in December 1975 and the Optional Protocol in March 1991. The Czech and Slovak Federal Republic ceased to exist on 31 December 1992. On 22 February 1993, the Czech Republic notified its succession to the Covenant and the Optional Protocol.

[2] Article 11 para. 2 of the Charter of Fundamental Rights and Freedoms stipulates that "law may determine that certain property may only be owned by the citizens or legal entities having their seat in the Czech Republic".

[3] See communication No. 516/1992, *Simunek v. Czech Republic*, Views adopted on 19 July 1995, communication No. 586/1994, *Adam v. Czech Republic*, Views adopted on 23 July 1996, and communication No. 857/1999, *Blazek v. Czech Republic*, Views adopted on 12 July 2001.

[4] See communication No. 182/1984, *Zwaan-de Vries v. The Netherlands*, Views adopted on 9 April 1987, para. 13.

[5] Communication No. 586/1994, *Adam v. Czech Republic*, Views adopted on 23 July 1996, para. 12.6, communication No. 857/1999, *Blazek v. Czech Republic*, Views adopted on 12 July 2001, para. 5.8 and communication No. 945/2000, *Marik v. Czech Republic*, Views adopted on 26 July 2005, para. 6.4.

S. Communication No. 1058/2002, *Vargas v. Peru* (Views adopted on 26 October 2005, eighty-fifth session)*

Submitted by:	Antonino Vargas Más (not represented by counsel)
Alleged victim:	The author
State party:	Peru
Date of communication:	14 January 2002 (initial submission)
Subject matter:	Trial and conviction of a person under anti-terrorist legislation
Procedural issue:	Lack of cooperation by the State party in the consideration of the communication
Substantive issues:	Violation of the right to liberty and security of person and guarantees of due process
Articles of the Covenant:	7, 9, 10 and 14
Articles of the Optional Protocol:	2

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 26 October 2005,

Having concluded its consideration of communication No. 1058/2002, submitted on behalf of Mr. Antonino Vargas Más under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the author of the communication and the State party,

Adopts the following:

Views under article 5, paragraph 4, of the Optional Protocol

1.1 The author of the communication, dated 14 January 2002, is Mr. Antonino Vargas Más, a Peruvian national, currently in detention in the Miguel Castro Castro penitentiary in Lima. He alleges a violation by Peru of article 7, article 9, paragraph 1, and article 14, paragraphs 1 and 2, of the International Covenant on Civil and Political Rights. The author is not represented by counsel.

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* The following members of the Committee participated in the examination of the present communication: Mr. Prafullachandra Natwarlal Bhagwati, Mr. Alfredo Castillero Hoyos, Ms. Christine Chanet, Mr. Maurice Glèlè Ahanhanzo, Mr. Edwin Johnson, Mr. Walter Kälin, Mr. Ahmed Tawfik Khalil, Mr. Michael O'Flaherty, Ms. Elisabeth Palm, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Ivan Shearer and Mr. Hipólito Solari-Yrigoyen.

1.2 The Optional Protocol entered into force for Peru on 3 January 1981.

The facts as submitted by the author

2.1 The author was the director of the César Vallejo university preparation school and a teacher of mathematics. On 20 June 1992, he was arrested in his home in Lima by police officers belonging to the Department of Counter-Terrorism (DINCOTE); the officers had no warrant. He states that he was taken to a DINCOTE facility and tortured. In particular, as has occurred with other prisoners, he was subjected to electric shocks and hung with his arms tied behind him. He was also taken to the beach, where he was subjected to mock drownings.

2.2 According to the Supreme Court judgement of 5 September 1996, the arrest was carried out in the context of an operation intended to dismantle the central logistical and financial command of the Sendero Luminoso terrorist group. The police entered the premises of the school on suspicion that the central logistical command was connected with it and that the school functioned as a training centre for Sendero Luminoso recruits. In conducting the operation the police seized subversive documentation and explosives from various premises and arrested a number of people, including the author, on the ground that they collaborated, in the performance of their various duties and functions, with the central logistical command. In the case of the author he was charged, specifically, with handing over money for the financing of terrorist activities. In addition, a typewriter was seized in the Sendero Luminoso central office containing a platen that showed the school's logo. The author denies all the charges.

2.3 The author was convicted of an "offence against the peace - terrorism - and the State" and sentenced to 20 years' imprisonment by the Special Terrorism Division of the Lima High Court (comprising three faceless judges) in a collective judgement of 30 November 1994. He asserts that the judgement did not specify individual criminal conduct but merely formulated vague and imprecise statements, and that the police report was the only evidence on which the prosecution and judgement were based.

2.4 The author filed an appeal for annulment before the Special Criminal Division of the Supreme Court, comprising faceless judges, which confirmed the sentence appealed against on 5 September 1996.

2.5 On 16 August 2001, the Supreme Court found the consequent application for judicial review inadmissible. The author alleges that the court's decision was not substantiated in law.

2.6 On 22 February 1999 the author, together with other co-defendants, filed an appeal for the constitutional remedy of habeas corpus before the Public Law Division of the Lima High Court. They alleged a failure to respect the rules of due process set forth in the Constitution and the Code of Criminal Procedure, including the right to the presumption of innocence and the right not to be tried by courts of special jurisdiction or special commissions.

Neither was the evidence for rebuttal taken into account. In addition, the judgement of 30 November 1994 simply reiterated the police analysis and assessment of the events recorded in the report as constituting fact, and made no mention of the applicable law. The appeal was rejected on 1 March 1999. The author appealed against this decision before the Constitutional Guarantee Court, which confirmed it on 22 June 1999.

2.7 On 27 September 2001, the author applied for a pardon to the Commission on Pardons, Clemency and Commutation in cases of terrorism and treason. The result of the application was negative. In May 2005, the author informed the Committee that, pursuant to new legislation that declares trials by faceless judges null and void, a retrial of his case began in November 2004; the proceedings have not yet concluded.

2.8 The author asserts that he has exhausted all possible domestic remedies available to him and that the case has not been submitted for examination under another procedure of international investigation or settlement.

The complaint

3.1 The author alleges that he was subjected to physical and psychological torture when held by DINCOTE. Although the author makes no specific reference to any provision of the Covenant, these allegations fall under article 7.

3.2 The author alleges a violation of article 9, paragraph 1, of the Covenant, since he was arrested without a warrant and without being caught in flagrante delicto.

3.3 The author also complains of the penal regime under which he is serving his sentence; he has access to the prison yard for only three hours a day, and must remain in a dark, wet cell for the rest of the day, with no access to books or to means of communication. Although the author makes no specific reference to any provision of the Covenant, these allegations fall under article 10.

3.4 The author alleges a violation of article 14, paragraph 1, of the Covenant in that he was tried by faceless judges, and the judgement of 30 November 1994 was based on general and imprecise assertions, which were not applied to him individually to establish responsibility or participation in the events that might give rise to responsibility for the offence.

3.5 The author alleges a violation of article 14, paragraph 2, of the Covenant relating to the right to the presumption of innocence, since the court, comprising faceless judges, viewed his denial of participation in the criminal acts as a presumption of proof of an offence, thus stripping him of any defence.

3.6 The author alleges that he was tried in proceedings that allowed no means of exercising the right to question the evidence, with his right to a defence undermined and with attorneys threatened with being dragged into the trial. Although the author makes no specific reference to any provision of the Covenant, these allegations fall under article 14, paragraph 3.

Lack of cooperation by the State party

4. On 6 March 2002, the State party was asked to submit its observations on admissibility and the substance of the allegations made by the author within six months. In the absence of any

reply, reminders were sent to the State party on 15 September 2004 and 18 November 2004. The Committee notes that the State party's observations have not been received. The Committee regrets the lack of cooperation by the State party and recalls that article 4, paragraph 2, of the Optional Protocol provides that the State party should in good faith examine all accusations brought against it and provide the Committee with any information available to it. Given that the State party has not cooperated with the Committee concerning the issues raised, the author's allegations must be accorded due importance to the extent that they are substantiated.

Issues and proceedings before the Committee

Consideration of admissibility

5.1 In conformity with rule 93 of its rules of procedure, before considering any claims made in a communication, the Human Rights Committee must decide whether or not the communication is admissible under the Optional Protocol to the Covenant.

5.2 The Committee has ascertained, as required under article 5, paragraph 2 (a), of the Optional Protocol, that the same matter is not being examined under another procedure of international investigation or settlement.

5.3 With regard to the requirement of exhaustion of domestic remedies, the Committee notes that the author was arrested in 1992 and subsequently tried and convicted in accordance with the legislation then in force in Peru. Prior to submitting his communication to the Committee, the author filed the appeals permitted by law against his conviction. In the absence of information from the State party on this point, the Committee considers that the author has complied with the requirements of article 5, paragraph 2 (b), of the Optional Protocol with regard to his allegations relating to article 9, paragraph 1, and article 14, paragraphs 1, 2 and 3, of the Covenant. The author does not explicitly mention having filed an appeal with regard to his allegations in the context of articles 7 and 10, paragraph 1. However, the Committee observes that these allegations are consistent with the practice that, in the Committee's experience, was common in respect of persons detained on suspicion of being linked to Sendero Luminoso, and against which there existed no effective remedies. Taking this into consideration, and given the absence of a reply from the State party, the Committee considers this part of the communication to be admissible.

5.4 The Committee declares the communication admissible with regard to the alleged violations of article 7, article 9, paragraph 1, article 10, paragraph 1, and article 14, paragraphs 1, 2 and 3, of the Covenant, and will consider it as to the merits in the light of the information furnished by the author, in accordance with the provisions of article 5, paragraph 1, of the Optional Protocol.

Consideration of the merits

6.1 The author alleges that, immediately following his arrest, he was taken to a facility of the Department of Counter-Terrorism (DINCOTE), where he was tortured, and he describes the type of torture to which he was submitted. In view of the State party's failure to adduce any information that might contradict these allegations, due weight must be given to them and it must be assumed that the events occurred as described by the author. Consequently, the Committee finds a violation of article 7 of the Covenant.

6.2 With regard to the author's allegations of a violation of article 9, paragraph 1, of the Covenant, in that he was arrested without a warrant and without being found in flagrante delicto, the Committee considers that, since the State party has not contested these allegations, due weight must be given to them and it must be assumed that the event occurred as described by the author. Consequently, the Committee finds a violation of article 9, paragraph 1, of the Covenant.

6.3 With regard to the author's allegations regarding the hardship inherent in the prison regime applied to him, the Committee also considers that, since the State party has not replied to the allegations, due weight must be given to them and it must be assumed that the events occurred as described by the author. Consequently, the Committee finds a violation of article 10, paragraph 1, of the Covenant.

6.4 With regard to the author's complaints under article 14 of the Covenant, the Committee takes note of the author's allegations that his trial was conducted by a court comprising faceless judges, that he did not have an opportunity to question witnesses and that his lawyer received threats. Given the circumstances of the case, the Committee, recalling all its previous jurisprudence in similar cases, considers that article 14 of the Covenant, which refers to the right to a fair hearing, taken as a whole, was violated.

7. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts that have been set forth constitute violations of article 7, article 9, paragraph 1, article 10, paragraph 1, and article 14 of the Covenant.

8. In accordance with article 2, paragraph 3 (a), of the Covenant, the State party is under an obligation to provide the author with an effective remedy and appropriate compensation. In the light of the long period he has already spent in detention, the State party should give serious consideration to terminating his deprivations of liberty, pending the outcome of the current proceedings. Such proceedings must comply with all the guarantees required by the Covenant.

9. Bearing in mind that, in acceding to the Optional Protocol, the State party has recognized the Committee's competence to determine whether there has been a violation of the Covenant and that, under article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the Covenant and to provide an effective and applicable remedy in the event that a violation has been found to have been committed, the Committee wishes to receive information from the State party within 90 days on the measures it has adopted to give effect to the Committee's Views. It also requests the State party to publish the Committee's Views.

[Adopted in English, French and Spanish, the Spanish text being the original version. Subsequently to be translated also in Arabic, Chinese and Russian as part of the Committee's annual report to the General Assembly.]

T. Communication No. 1070/2002, *Kouidis v. Greece*
(Views adopted on 28 March 2006, eighty-sixth session)*

Submitted by:	Mr. Alexandros Kouidis (represented by counsel)
Alleged victim:	The author
State party:	Greece
Date of communication:	26 November 2001 (initial submission)
Subject matter:	Confession under alleged torture, unfair trial
Procedural issues:	Admissibility *ratione temporis*, exhaustion of domestic remedies
Substantive issues:	Torture and cruel and inhuman or degrading treatment, human treatment of detainees, forced confession of guilt, fair trial
Articles of the Covenant:	Articles 7; 10, paragraph 1; 14, paragraphs 3 (g) and 1

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 28 March 2006,

Having concluded its consideration of communication No. 1070/2002, submitted to the Human Rights Committee on behalf of Mr. Alexandros Kouidis under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the author of the communication, and the State party,

Adopts the following:

Views under article 5, paragraph 4, of the Optional Protocol

1.1 The author of the communication is Alexandros Kouidis, a Greek citizen born on 21 May 1950, currently serving a life sentence at the Court Prison of Kerkyra in Corfu. He claims to be a victim of violations by Greece of articles 7; 10, paragraph 1; and 14, paragraphs 3 (g) and 1, of the International Covenant on Civil and Political Rights (the Covenant). The author is represented by counsel.

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* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Nisuke Ando, Mr. Prafullachandra Natwarlal Bhagwati, Ms. Christine Chanet, Mr. Maurice Glèlè Ahanhanzo, Mr. Edwin Johnson, Mr. Walter Kälin, Mr. Ahmed Tawfik Khalil, Mr. Rajsoomer Lallah, Mr. Michael O'Flaherty, Ms. Elisabeth Palm, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Ivan Shearer, and Mr. Hipólito Solari-Yrigoyen.

1.2 The Covenant and the Optional Protocol entered into force for the State party on 5 August 1997.

Facts as presented by the author

2.1 On 17 May 1991, the author was arrested, interrogated and later charged with possession, purchase, import into Greece and sale of narcotic substances, possession of firearms, creation of a criminal group, and document forgery.

2.2 On 12 October 1992, he was found guilty as charged and sentenced to 18 years imprisonment by a three-member panel of the criminal court. On appeal, the five-member Athens Court of Appeal (hereafter the Appeal Court), by judgement of 4 November 1996, sentenced him to life imprisonment, a concurrent sentence of four years imprisonment, and a fine. On 3 April 1998, the Supreme Court confirmed the judgement of the Appeal Court.

2.3 According to the author, the judgements of the Appeal Court and the Supreme Court were based, inter alia, on the allegation that the author, during his post-arrest interrogation by the police, partially confessed the commission of the crime of trafficking and possession of narcotics. However, the author never made such a confession of his own free will, but allegedly after being subjected to grave corporal and physical violence inflicted by the police officers who had interrogated him. From 17 May to 27 June 1991, while being detained at the Athens General Police Directorate (GADA), the author was brutally beaten and systematically punched in the face, and his feet were subjected to falanga.[1] As a result of the ill-treatment, the author confessed that the apartment at Magnisias street, Athens, where the police had found cocaine, heroin and cannabis, was his second residence and was used to store drugs, which were, according to the indictment, subsequently dispatched to drug addicts.

2.4 However, the author claims that in reality, he lived at a different address in Athens, and that the above-mentioned apartment was rented by one of his friends, who lived there and occasionally let the author stay in a room.

2.5 To support these claims, counsel submits a photograph of the author in a Greek daily newspaper, published five days after his arrest. In addition, the author points out that after his arrest, he stayed at the Aghios Pavlos Hospital in Athens for fourteen months in order to recover from the torture and serious ill-treatment which he had suffered. Finally he underlines that the landlords of the apartment of Magnisias street were never interrogated or subpoenaed by the police, nor did they identify the author as the tenant of the apartment.

2.6 The author refers to the court transcripts and judgements of the Appeal Court and the Supreme Court and claims that even though he stated to the Appeal Court that he had been subjected to torture and ill-treatment which led to his forced confession, his allegations were not investigated or taken into account. He quotes from the minutes of his judgement by the Appeal Court, in which he is reported to have declared: "I said to the police that I brought the cocaine from there,[2] because I was beaten without mercy." The judgement of the Supreme Court mentions that "the defendant Kouidis partially confessed the crime attributed to him, regarding drug trafficking. Particularly, he restricted his confession to the possession of the amounts that were confiscated". However, the Supreme Court did not mention the author's statements regarding his subjection to torture and cruel, inhuman and degrading treatment.

2.7 The author claims to have exhausted domestic remedies and states that the same matter is not being examined under another procedure of international investigation or settlement.

The complaint

3.1 The author alleges violations of his Covenant rights because of torture and cruel, inhuman and degrading treatment by the police during his interrogation, which led to a confession and an unfair trial.

3.2 He claims to be a victim of a violation of article 7 of the Covenant, as he was subjected to torture (falanga) and cruel, inhuman and degrading treatment (severe, systematic beating and punching) during his interrogation by the police.

3.3 He further claims to be the victim of a violation of article 10, paragraph 1, as he was not treated with humanity and with respect for the inherent dignity of the human person during his detention by the police.

3.4 The author claims that the State party violated article 14, paragraph 3 (g), in that he was compelled to confess his guilt, following his torture and ill-treatment during his interrogation by the police and during pretrial detention.

3.5 Finally the author alleges a violation of article 14, paragraph 1, as he did not enjoy the right to a fair trial before the Appeal Court and the Supreme Court, because their judgements were based, inter alia, on his forced self-incrimination.

The State party's submission on the admissibility and merits of the communication

4.1 By note verbale of 27 January 2003, the State party commented on the admissibility and merits of the communication. It denies the author's claims of torture and cruel, inhuman and degrading treatment, submits that the author's confession was not taken into account during the trial, and claims that he received a fair trial.

4.2 On factual issues, the State party indicates that the author resisted his arrest on 17 May 1991. A fight ensued with the arresting officers, further to which the author was taken to hospital and treated for physical injuries (contusions). However, he was not hospitalized as this was deemed unnecessary.

4.3 The State party indicates that the search of the author's car revealed three million drachmas and drugs in various bags, which were confiscated. Further, his house was searched and large quantities of heroin, cannabis and cocaine were found. The search was extended to his second residence in another area of Athens (Patissia), where additional large quantities of drugs were found. The search also revealed forged documents, identity cards, passports and unlicensed firearms. After undergoing preliminary interrogation by the police, the author was taken to the Public Prosecutor on 18 May, who initiated criminal proceedings against him on the above-mentioned charges (paragraph 2.1). The following day, he was taken before the examining Judge for interrogation.

4.4 The State party contends that the author did not complain to the Public Prosecutor on 18 May 1991 about the alleged inhuman and degrading treatment by the police officers who arrested and interrogated him, nor did the author request to be examined by a medical officer. Similarly, when he was brought before the regular examining Judge for interrogation on 19 May 1991, he neither complained of ill treatment by the police, nor requested a medical examination. The author also made no mention that physical or psychological force had been used by law enforcement authorities to make him confess to the crimes he was accused of.

4.5 The State party contends that on 22 May 1991, the author informed an interrogating judge that his testimony made before the police officers at the Police Headquarters was invalid because it was the result of police brutality. He indicated that he was beaten, tied, hit in the eyes and the ribs, and was coerced to say what he said. At the end of the testimony, he asked to be examined by a medical examiner, but with the sole purpose of proving that he was a drug addict, thus avoiding harsher punishment inflicted on drug dealers. He never asked to be examined for ill treatment and torture. The medical examination report did not indicate any significant findings. If there had been signs of ill-treatment or torture, they would have been included in the report of the physical examination, even if its object was to find out if the author was a drug addict or not.

4.6 On 27 June 1991, the author was admitted at Saint Paul Prisoners Hospital, to be treated for haematuria (presence of blood in the urine), and on 30 August, he returned to prison of his own free will. On 11 October, he was readmitted to hospital for the same cause, and on 5 November, he was transferred to a more appropriately equipped public hospital to undergo controls on haematuria and possible cancer. The State party emphasises that at no stage of his treatment at the Prisoners Hospital was the author treated as a victim of inhuman abuse and torture. The author repeatedly requested the interruption of his detention due to irreversible health damage, but all petitions were dismissed. Furthermore, at no point did the author remain in hospital for fourteen consecutive months, as he claims in his communication, to be treated for severe physical injury to the feet or head or to any other part of his body.

4.7 On 10 July 1992, the author was admitted to Athens General Hospital, from where he failed an attempted escape three days later. According to the State party, doctors at the Prisoners Hospital were also involved in the escape plan and issued medical certificates for him to be transferred to the public hospital. However, these certificates did not mention any symptoms of abuse or torture of the author.

4.8 On admissibility, the State party notes that the facts as presented in the communication occurred in 1991, before the entry into force for Greece of the Covenant and the Optional Protocol. It argues that it cannot be held responsible for violations of the Covenant which took place before it became a State party.

4.9 It further argues that the author has not exhausted domestic remedies, as he has not filed an action for reparation on the grounds of illicit police brutality before the national courts. According to Greek administrative law, in cases of acts or omissions of civil servants in the exercise of public duties assigned to them, the state is liable for damages, along with the civil servant who committed the act or omitted to take action. Further, he has not filed a complaint with the Public prosecutor or the national courts against the State party or any specific police officers for inhuman and degrading treatment during the preliminary interrogation. The State party argues that if he had done so, an investigation and criminal proceedings would have been instituted against the policemen alleged to have participated in such acts.

4.10 On the merits and the allegations of unfair trial, the State party argues that the author's confession during his preliminary interrogation had no effect on his conviction. The State party emphasizes that in the first instance court, which originally convicted the accused in 1992, it did not consider the confession of the author dated 20 May 1991 in rendering a decision.

4.11 The same held true on Appeal. In its judgement of 4 November 1996, the Appeal Court indicated that the accused pleaded guilty of possession of large quantities of drugs, while denying the accusation of dealing with drugs. It further held that the author could not reasonably explain the possession of a precision scale (for drugs), the large amount of money found in his alternative residence, nor the large quantities of cocaine and heroin found in his car, and thus found him guilty of all the charges. The State party argues that the Appeal Court did not base its finding on the author's confession - because the confession was never introduced into evidence. The State party notes that: "As it appears from the minutes as well as the judgement in question, among the documents used as evidence for the formation of a ruling there is no mention of any confession made by the accused to the police officers conducting the preliminary investigation." Rather, his conviction and sentence of life imprisonment were based on the sum total of the evidence presented, his inability to overturn incontestable evidence, and the inconsistencies in his statements.

4.12 The State party notes that if the confession had been used at the Appeal Court, the author would have been able to request the invalidation of the judgement, on the basis of article 171, paragraph 1, section d, of the Code of Civil Procedure, which provides that a judgement shall be declared null and void as a whole if the court admits as evidence for the establishment of guilt, the contents of documents or statements which were not read during the hearing, or were not corroborated by other evidence. The author, however, made no such request.

4.13 Furthermore, the State notes that the author never alleged in national courts - including the Supreme Court - that the Appeal Court based its conviction on documents which had not been presented at the hearing. In any case, use of new evidence would have been illegal, and thus the Court could not have taken it into consideration for its deliberations and *ratio decidendi*.

4.14 According to the State party, the Supreme Court could not consider the author's claims of abuse during the preliminary investigation, as these allegations referred to facts and not to legal issues, and thus fell outside the competence of the Supreme Court.

4.15 On a general basis, the State party refers to the jurisprudence of the European Court of Human Rights, according to which the evaluation of evidence during criminal trials is mainly an issue to be handled by national law, while the European Court's role is to determine the fairness of the entire procedure. It states that as a general rule, the national court is competent to decide on the evidence presented before it.

4.16 On the allegations of a violation of article 7 of the Covenant, the State party contends that there is no issue of torture or cruel, inhuman or degrading treatment or punishment, in violation of article 7 of the Covenant. It refers to the jurisprudence of the European Court, according to which it is necessary to evaluate whether the treatment reached a certain minimum of brutality, as well as whether the treatment was aimed at degrading and humiliating the victim.

Author's comments on the State party's submission

5.1 On 23 April 2003, the author responded to the State party's submissions. On the admissibility ratione *temporis* argument, he claims that the torture he suffered had continuous effects after the entry into force of the Covenant, because the author's confession, obtained through torture, was taken into account, and expressly referred to in the judgements of the Appeal Court (1996) and the Supreme Court (1998), which led to the author's conviction. In addition the ill-treatment has a continuous traumatic effect on his psyche and personality.

5.2 With regard to the claim that he did not exhaust domestic remedies in relation to his claims under article 14, paragraphs 1 and 3 (g), the author argues that his case was considered by the Supreme Court and that no further appeals are available. In relation to his claims under articles 7 and 10, paragraph 1, the author contends that he did not start proceedings for reparation, as his aim was a fair trial and not monetary compensation. In this regard, he claims to have continuously complained about his torture and severe ill-treatment to the examining judge and the Appeal Court, the latter complaint being reported in the 1996 minutes-judgement of the Appeal Court. However, no attention was paid to his statements, and the Public prosecutor failed to initiate an investigation and prosecution *ex officio*, as he should have under articles 137A and 137B of the Penal Code, which provide for the punishment of the crimes of torture and ill-treatment by state organs. The author argues that, in any case, such a complaint had no reasonable prospect of success, as ill-treatment and torture by police officials have been commonplace in Greece and the victims' complaints have never resulted in a conviction by the courts.

5.3 On the merits, the author rejects the State party's contention that his only ailment following his arrest by the police on 17 May 1991 was "slight physical injury (contusions)". He reiterates that he was brutally beaten and tortured by the police (systematically punched in his face, on his ribs and subjected to falanga) during his pretrial detention and interrogation. This ill-treatment continued in the course of his pretrial detention on the premises of the Athens General Police Directorate (GADA), from 17 May to 27 June 1991, even after he was taken to the Public Prosecutor on 18 May and the examining judge on 19 May.

5.4 The author contends that haematuria, which he suffered from, is a common symptom of torture and severe ill-treatment, and was the direct and incontestable result of the torture and severe ill-treatment he was subjected to.

5.5 He contends that he was hospitalized from 27 June to 30 August 1991 to be treated for haematuria, and then from 11 October 1991 to 4 August 1992, due to diagnosed arthropathy (pain) of his knees, back and spine, as a result of the torture and ill-treatment he suffered while in pretrial detention. He rejects the State party's indication that he was hospitalized and examined for possible cancer, as he never had any cancer related symptoms.

5.6 On the State party's claim that the author did not make any complaint of ill-treatment to the competent judicial authorities before his trial, the author reiterates his claims that he did complain about torture and ill-treatment to all judicial authorities before and during his trial. He also recalled that he had complained about the ill treatment to the Appeal Court, as is confirmed in the transcript of the proceedings, where it is stated that the author said that he confessed to the police because he was beaten by the police without mercy. He claims, however, that the Greek authorities did not pay attention to his complaints.

5.7 The author argues that the Greek authorities rarely prosecute police officers accused of ill-treatment, and refers to a report of Amnesty International and the Helsinki Federation for Human Rights reporting on numerous allegations of ill-treatment, in some cases amounting to torture, of detainees, generally during arrest or at police stations, and on the reluctance of prosecuting and judicial authorities to prosecute police officers. He invokes reports of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) published after visits to Greece in 1993, 1997 and 2001. According to these reports, "ill-treatment of detained persons by police officers remained fairly commonplace for at least certain types of criminal suspects".[3]

5.8 Finally, the author reiterates his claims that his confession obtained through torture constituted one of the decisive elements that seriously influenced the *ratio decidendi* of the judgements of the Appeal Court and Supreme Court. In its judgement, the Appeal Court notes that the author "partially confessed, limiting his confession exclusively to the possession of the confiscated quantities". However, no confession was read during the hearing. The only reference to a confession during the hearing was the author's above-mentioned testimony (paragraph 2.6), during which he mentioned ill-treatment. The Supreme Court judgement mentions that the author "partially confessed to the accusation attributed to him with regard to drug-trafficking. More specifically he limited his confession only to possession of drug quantities that were confiscated". The author concludes that his confession was taken into account by the two courts when deciding his case and convicting him.

Issues and proceedings before the Committee

Consideration of admissibility

6.1 Before considering any claim contained in a communication, the Human Rights Committee must, in accordance with rule 93 of its Rules of Procedure, decide whether or not the communication is admissible under the Optional Protocol to the Covenant.

6.2 The Committee has ascertained that the same matter is not being examined under another procedure of international investigation or settlement for purposes of article 5, paragraph 2 (a) of the Optional Protocol.

6.3 The Committee takes note of the State party's objection that the communication is inadmissible *ratione temporis*, as it relates to events which occurred prior to the entry into force of the Optional Protocol for Greece on 5 August 1997. The Committee refers to its prior jurisprudence and reiterates that it cannot consider alleged violations of the Covenant which occurred before the entry into force of the Optional Protocol for the State party, unless these violations continue after that date or continue to have effects which in themselves constitute a violation of the Covenant.[4] The Committee has found continuous violations where States, by act or by clear implication, have affirmed previous violations after the Optional Protocol entered into force.[5] The Committee observes that the author's claims under article 10, paragraph 1, refer to his arrest and pretrial detention in 1991, i.e. before the entry into force of the Optional Protocol for the State party, and finds this part of the communication inadmissible *ratione temporis* pursuant to article 1 of the Optional Protocol.

6.4 The author's claims under article 7 equally refer to the above-mentioned detention period and to the continuous effects of the treatment he was subjected to. The author has not substantiated his claim that any continuous effects of the treatment would in themselves constitute a violation of the Covenant and thus meet the requirement of the test set out in para. 6.3. The Committee therefore finds that the claim under article 7 read alone is inadmissible *ratione temporis* under article 1 of the Optional Protocol.

6.5 However, the Committee notes that although the author was convicted on appeal on 4 November 1996, i.e. before the entry into force of the Optional Protocol for the State party, the judgement of the Supreme Court upholding the Appeal Court judgement was issued on 3 April 1998, after the Optional Protocol came into force. The Committee reiterates its jurisprudence that a second or final instance judgement, confirming a conviction, constitutes an affirmation of the conduct of the trial.[6] The claims under article 14, paragraphs 3 (g) and 1, refer to the conduct of the trial, which continued after the entry into force of the Optional Protocol for the State party. The Committee concludes that it is not precluded *ratione temporis* from considering the communication insofar as it raises issues relating to the author's trial.

6.6 With respect to the State party's argument that the author did not exhaust domestic remedies in relation to his torture claims, and considering these claims as arising under article 7 read in conjunction with article 14, paragraph 3 (g), the Committee notes that the judgement of the Appeal Court specifically mentions the author's statement that he was "beaten without mercy" by the police and concludes that the State party was aware of the author's claims of ill-treatment at the time of the trial, and finds that the author has exhausted domestic remedies in that respect.

6.7 The Committee concludes that the communication is admissible insofar as it raises issues under article 7 in conjunction with article 14, paragraph 3 (g), and 14, paragraph 1, read alone, and proceeds to its examination on the merits.

Consideration of the merits

7.1 The Human Rights Committee has considered the present communication in the light of all the information made available to it by the parties, as provided in article 5, paragraph 1, of the Optional Protocol.

7.2 The Committee notes that the State party and the author have provided essentially conflicting versions of the facts, in relation to the occurrence of ill-treatment during the author's pretrial detention, the reasons for his hospitalization, and the use of his confession by the courts during the trial.

7.3 The Committee observes that the evidence provided by the author in support of his claims of ill-treatment are a newspaper photograph of poor quality, that he allegedly spent fourteen months in hospital from related medical treatment, the lack of interrogation by the prosecution of the landlords of the apartment mentioned in his confession, and reports of NGOs and the CPT. On the other hand, the State party indicates that the author did not request to be examined by a medical officer with the purpose of establishing ill-treatment, which has not been contested by the author. The Committee further notes that despite spending such a long time in hospital so soon after the alleged ill-treatment,[7] and despite being in possession of medical certificates concerning his treatment in hospital of haematuria and arthropathy of his knees, back and spine, these certificates do not indicate that any of these sufferings resulted from actual ill-treatment. Nor do any of these certificates mention any traces or consequences of beatings on the author's head or body. The Committee considers that the author, who had access to medical care, had the possibility of requesting a medical examination and did so for the purpose of proving that he was a drug addict.[8] However, he failed to request a medical examination for the purpose of establishing ill-treatment.

7.4 Further, as noted by the State party, the manner in which a case should be investigated is for the national investigating authorities to decide, in as far as it is not arbitrary. The Committee considers that the author has not demonstrated that the investigating officers acted arbitrarily by failing to interrogate the landlords of the apartment in Magnisias street. Finally the NGO and Committee on the Prevention of Torture reports submitted by the author are of a general character and cannot establish ill-treatment of the author. In the circumstances, the Committee cannot conclude that the confession of the author resulted from treatment contrary to article 7, and finds that the facts do not disclose a violation of article 7 read in conjunction with article 14, paragraph 3 (g).

7.5 On the claim under article 14, paragraph 3 (g) read alone, the Committee notes the Supreme Court was aware of the allegations of ill-treatment. The Committee considers that the obligations under article 14, paragraph 3 (g) entail an obligation of the State party to take account of any claims that statements made by accused persons in a criminal case were given under duress. In this regard, it is immaterial whether or not a confession is actually relied upon, as the obligation refers to all aspects of the judicial process of determination. In the present case, the State party's failure, at the level of the Supreme Court, to take account of the author's claims that his confession was given under duress, amount to a violation of article 14, paragraph 3 (g).

7.6 On the claim under article 14, paragraph 1, that the trial and conviction was based inter alia on the author's confession, the Committee notes the State party's argument that the courts did not base their judgements on the author's confession. The Committee reiterates its jurisprudence that it is primarily for the courts of States parties to review facts and evidence in a particular case. It is for the appellate courts of States parties, and not for the Committee, to review the conduct of the trial, unless it can be ascertained that the evaluation of evidence was clearly arbitrary or amounted to a denial of justice, or that the judge manifestly violated his or her obligation of impartiality.[9] It appears that the author's trial does not suffer from any such defects. Accordingly, this part of the communication does not reveal a violation of article 14, paragraph 1.

8. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol, is of the view that the facts before it disclose violations of article 14, paragraph 3 (g), of the Covenant.

9. In accordance with article 2, paragraph 3 (a), of the Covenant, the State party is under an obligation to provide the author with an effective and appropriate remedy, including the investigation of his claims of ill-treatment, and compensation.

10. Bearing in mind that, by becoming a State party to the Optional Protocol, the State party has recognized the competence of the Committee to determine whether there has been a violation of the Covenant or not and that, pursuant to article 2 of the Covenant, the State party has

undertaken to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the Covenant, the Committee wishes to receive from the State party, within 90 days, information about the measures taken to give effect to its Views. The State party is also requested to publish the Committee's Views.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently to be issued in Arabic, Chinese and Russian as part of the Committee's annual report to the General Assembly.]

Notes

[1] Beating of the soles of the feet.

[2] The author refers to the apartment of Magnisias street where the drugs were found.

[3] Doc. CPT/Inf (94) 20, 29.11.1994, para. 18.

[4] See communication No. 520/1992, *Könye and Könye v. Hungary*, Decision on admissibility of 7 April 1994, para. 6.4; communication No. 24/1977, *Sandra Lovelace v. Canada*, Views adopted on 30 July 1981, para. 7.3.

[5] See communication No. 1033/2001, *Nallaratnam Singarasa v. Sri Lanka*, Views adopted on 21 July 2004, para. 6.3; communication No. 520/1992, *E. and A.K. v. Hungary*, Decision on admissibility of 7 April 1994, para. 6.4; communication No. 593/1994, *Patrick Holland v. Ireland*, Decision on admissibility of 26 October 1996, para. 9.2.

[6] See communication No. 1033/2001, *Nallaratnam Singarasa v. Sri Lanka*, Views adopted on 21 July 2004, para. 6.3.

[7] The author claims to have been subjected to torture and cruel, inhuman and degrading treatment from 17 May to 27 June 1991, and was hospitalized on 27 June.

[8] See para. 4.17 above.

[9] See communication 838/1998, *Ola Hendricks v. Guyana*, Views adopted on 28 October 2002, para. 6.2.

U. Communication No. 1085/2002, *Taright v. Algeria* (Views adopted on 15 March 2006, eighty-sixth session)*

Submitted by:	Abdelhamid Taright, Ahmed Touadi, Mohamed Remli and Amar Yousfi (represented by counsel)
Alleged victims:	The authors
State party:	Algeria
Date of communication:	5 January 1999 (initial submission - registered on 23 May 2002 following additional submissions from the authors)
Subject matter:	Pretrial detention, failure to comply with the right to trial within a reasonable time
Procedural issues:	Exhaustion of domestic remedies, allegations insufficiently substantiated for the purposes of admissibility, admissibility *ratione materiae*
Substantive issues:	Pretrial detention, failure to comply with the right to trial within a reasonable time
Articles of the Covenant:	7, 9, paragraphs 1 and 3, 10, paragraph 1, 14, paragraphs 1, 2 and 3 (c), 16 and 17
Articles of the Optional Protocol:	2, 3 and 5, paragraph 2 (b)

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 15 March 2006,

Having concluded its consideration of communication No. 1085/2002, submitted on behalf of the authors by Abdelhamid Taright, Ahmed Touadi, Mohamed Remli and Amara Yousfi under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the authors of the communication and the State party,

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* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Nisuke Ando, Mr. Prafullachandra Natwarlal Bhagwati, Ms. Christine Chanet, Mr. Maurice Glèlè Ahanhanzo, Mr. Edwin Johnson, Mr. Walter Kälin, Mr. Ahmed Tawfik Khalil, Mr. Rajsoomer Lallah, Mr. Michael O'Flaherty, Ms. Elisabeth Palm, Mr. Rafael Rivas Posada, Mr. Ivan Shearer, Mr. Hipólito Solari-Yrigoyen and Mr. Roman Wieruszewski.

Adopts the following:

Views under article 5, paragraph 4, of the Optional Protocol

1. The authors of the communication, dated 5 January 1999, are Abdelhamid Taright, Ahmed Touadi, Mohamed Remli and Amar Yousfi, Algerian citizens residing in Algeria. They claim to be victims of violations by Algeria of article 7; article 9, paragraphs 1 and 3; article 10, paragraph 1; article 14, paragraphs 1, 2 and 3 (c); and articles 16 and 17 of the International Covenant on Civil and Political Rights. The authors are represented by counsel. The Optional Protocol entered into force for Algeria on 12 December 1989.

The facts as submitted by the authors

2.1 On 9 March 1996, Abdelhamid Taright, Ahmed Touadi, Mohamed Remli and Amar Yousfi, respectively chairman of the board of directors, general manager, financial director and director of supplies of the State-owned company COSIDER, were charged with misappropriation of public funds, forgery and use of forged documents and placed in pretrial detention. On 30 March 1996, the investigating judge appointed an expert to review the management of COSIDER within one month. By order of the investigating judge on 12 May 1996, the bank accounts of all the authors were blocked. By a further order of the investigating judge on 8 June 1996, Abdelhamid Taright's property assets were seized.

2.2 Several requests for provisional release were submitted. The application by Abdelhamid Taright on 29 June 1996 for provisional release was refused by the investigating judge in an order of 30 June 1996, confirmed by a decision of the Indictments Chamber of 16 July 1996. A second application dated 19 November 1996 was refused in a decision of the Indictments Chamber of 17 November 1996. A third application dated 28 March 1998 went unanswered. A fourth application was again refused in a decision of the Indictments Chamber of 2 August 1998. A further application for the provisional release of all the authors was rejected in a decision of the Indictments Chamber of 30 December 1998. The authors add that several more applications for release, dates unspecified, were submitted by Ahmed Touadi, Mohamed Remli and Amar Yousfi. The authors were released provisionally under court supervision in a decision of the Indictments Chamber of 7 September 1999. In the case of Abdelhamid Taright, court supervision was lifted in a judgement of 27 December 1999.

2.3 With regard to the expert opinions, on 17 November 1996 the Indictments Chamber dismissed as inaccurate and confused the report of the first expert delivered on 5 August 1996, and appointed a panel of three experts. In a decision of 10 February 1998 the Indictments Chamber decided to relieve the experts of their mission on the grounds that their fees were excessive and to entrust the mission to the General Inspectorate of Finance (IGF). In a decision of 2 August 1998 it ordered an additional expert opinion from the IGF. On 6 January 1999, the authors filed a complaint alleging forgery on the part of the experts, which was dismissed on 24 March 1999.

2.4 As far as the confiscation of the authors' property was concerned, the application of 16 September 1996 to lift the seizure concerning Abdelhamid Taright was refused by the investigating judge in an order of 28 September 1996. The appeal against the order was rejected by the Indictments Chamber in a decision of 17 November 1996.

2.5 In a decision of 30 December 1998 the Indictments Chamber referred the accused to the criminal courts (for embezzlement of public property and placing of contracts contrary to the company's interests). On 31 January 1999 the authors filed an appeal on points of law. On 8 June 1999 the Supreme Court quashed the judgement in question for failure to comply with the rights of the defence and referred the case back to the Indictments Chamber. On 27 February 2001 the Indictments Chamber once again handed down a referral to the criminal courts. The authors then appealed once more on points of law on 7 April 2001. On 29 April 2002 the Supreme Court this time confirmed the referral order. The authors appeared before the Algiers criminal court in October 2002 and were acquitted on 16 July 2003.

The complaint

3.1 The authors consider that in their case justice was exploited for the purposes of a so-called morality and anti-corruption political campaign. They assert that their complaints concern their arbitrary detention, the failure to comply with their right to a trial within a reasonable time and the forfeiture of all their civil rights.

3.2 With regard to the first complaint, the authors explain that their pretrial detention from 9 March 1996 to 7 September 1999, lasting 3 years and 6 months, is a flagrant violation of article 125 of the Algerian Code of Criminal Procedure, according to which such detention must not exceed 16 months. Several applications for provisional release had been rejected, although magistrates were alone responsible for the excessive delays in the investigation proceedings. The authors submit that this constitutes a violation of article 9, paragraph 1, of the Covenant.

3.3 Concerning the second complaint, the authors were not tried and acquitted until 16 July 2003, although they had been charged on 9 March 1996, without any responsibility being attributable to them for the accumulated delays in proceedings, since it was the Indictments Chamber which had changed experts several times. In the authors' opinion, the various expert reports reveal neither embezzlement nor misappropriation but merely report losses due to alleged mismanagement. Lastly, they consider that the presumption of innocence was breached and that, more generally, the conditions for the right to a fair trial were impaired. The authors allege violations of articles 9, paragraph 3, and 14, paragraphs 1, 2 and 3 (c).

3.4 With regard to the third complaint, the authors consider that the confiscation of Abdelhamid Taright's property assets and the blocking of all their bank accounts contravene article 84 of the Algerian Code of Criminal Procedure and the relevant case law, which permits the seizure only of property directly related to the offence, excluding personal property. They add that the applications from counsel to have the seizure lifted were unsuccessful. The authors therefore find that they were deprived of recognition as persons before the law (art. 16 of the Covenant) and subjected to forfeiture of their civil rights, which in their view constitutes cruel and inhuman treatment (art. 7 of the Covenant) and impairment of the inherent dignity of the human person (art. 10, para. 1) and of their honour and reputation (art. 17).

3.5 With regard to their appeals to domestic courts, where the first complaint was concerned, after recalling their appeals to the investigating judge and the Indictments Chamber, the authors point out that under article 495 (a) of the Algerian Code of Criminal Procedure, no appeal on points of law may be brought against judgements of the Indictments Chamber concerning pretrial detention. With regard to the second complaint, the authors submit that the excessive delay in respect of a judgement was to be blamed on the judicial authorities in Algiers. As for the third complaint, apart from the appeals mentioned above, the authors state that they did not appeal on a point of law against the judgement of the Indictments Chamber of 17 November 1996 partly because, since the seizure was a provisional measure on which the trial court was required to take a decision, an appeal had no chance of success, and partly because the appeal would have had the effect of suspending the entire proceedings for approximately a year pending a ruling by the Supreme Court.

The State party's submissions on admissibility and merits

4.1 In a note verbale of 11 July 2002 the State party begins by questioning the admissibility of the communication. It takes the view that the authors have not exhausted the domestic remedies available under Algerian law and themselves acknowledge that the case was still under investigation and still pending before the Indictments Chamber when they submitted it to the Committee on 5 January 1999. The State party adds that the authors continued to pursue domestic remedies which had not yet been exhausted after submitting the case to the Committee. They in fact appealed on points of law against the decision of the Indictments Chamber of 30 December 1998, which had referred the case back to the criminal courts.

4.2 The State party retraces the timing of events and points out that the investigating judge, deeming the facts to be sufficiently serious and after informing the authors of the charges brought against them and taking their statements, ordered that they should be placed in pretrial detention, in accordance with the Algerian Code of Criminal Procedure. It notes that the complexity of the case required a series of judicial expert opinions and recalls that when the criminal court was ready to try the case, the authors chose to appeal on two occasions on points of law, which prolonged the proceedings.

4.3 The State party considers not only that domestic remedies have not been exhausted, as the case was still before the courts,[1] but also that the authors' appeals produced results insofar as they led to the annulment of the first referral judgement, a modification of the charges and a lower estimate of the damage. The appeals also enabled the authors to be released before their trial although the Indictments Chamber was allowed by law to keep them in custody until the criminal court hearing. Consequently, since the authors have not exhausted all domestic remedies, their communication is inadmissible.

4.4 With regard to the validity of the communication, the State party insists that the interim protective or investigative measures were ordered by an investigating judge apprised of the case in accordance with the law, as part of a judicial investigation. It considers that the authors benefited from all the guarantees set forth in the Covenant in respect of their arrest, detention and indictment.

4.5 With reference to the pretrial detention, the State party recalls that it was ordered on 9 March 1996 as part of a criminal investigation, which allows the investigating judge to keep the accused in custody for a period of not more than 16 months under article 125 of the Code of Criminal Procedure. It notes that the investigating judge closed the file by a transmission order to the Principal State Prosecutor within the deadline established in the Code of Criminal Procedure. It explains that the custody of the authors was extended beyond the 16-month period under article 166 of the Code of Criminal Procedure, which stipulates that:

> If the investigating judge considers that the facts constitute an offence classed as a crime by law, he shall order the file of the proceedings and the evidence to be transmitted without delay by the public prosecutor to the Principal State Prosecutor at the Court for examination as set out in the chapter concerning the Indictments Chamber. The arrest warrant or detention order shall be enforceable until the Indictments Chamber hands down its decision.

The State party notes that the Indictments Chamber had deemed the investigation incomplete, had ordered additional information to be provided and had kept the authors in custody pending its decision on the merits, handed down on 30 December 1998. After they were referred to the criminal court, the authors remained in custody until they appeared before the trial court, in accordance with article 198 of the Code of Criminal Procedure, which provides that:

> The Indictments Chamber shall furthermore issue an arrest warrant for any accused prosecuted for a crime specified by the Chamber. Such warrant is immediately enforceable. […] It shall continue to be enforceable in respect of the accused held in custody until the criminal court hands down its judgement.

4.6 The State party emphasizes that the authors would have been tried early in 1999 if they had not filed so many appeals on points of law. It notes that the Indictments Chamber nevertheless used the prerogatives allowed by law to order the release of the authors before they appeared before the criminal court and gave one of them permission to leave the national territory for health reasons. The State party therefore considers unfounded the allegations of a violation of articles 9 and 14.

4.7 In any case, and should the trial court decide to acquit the authors,[2] the State party points out that they will be entitled to appeal to the Compensation Commission in the Supreme Court for compensation for the injury sustained as a result of their pretrial detention, in accordance with article 137 bis et seq. of the Code of Criminal Procedure.

4.8 With regard to the alleged forfeiture of civil rights and the violation of articles 7, 10 and 16 of the Covenant, resulting from the decision of the investigating judge to seize land belonging to Abdelhamid Taright and to block the bank accounts of all the authors, the State party specifies that, while this was an interim measure of protection, it did not affect all the authors' property; it was taken by the investigating judge to safeguard the rights of the parties and the Treasury, and in any case it is the responsibility of the trial court to take a decision as to its legality and the appropriate follow-up.

Authors comments and State party's observations

5. In a letter of 17 March 2003, counsel stated that he did not wish to comment on the State party's submissions.

6. In a note verbale of 12 November 2003, the State party notified the Committee that it had no further submissions to make.

Issues and proceedings before the Committee

Consideration of admissibility

7.1 Before considering any claim contained in a communication, the Human Rights Committee must, in accordance with rule 93 of its rules of procedure, decide whether or not it is admissible under the Optional Protocol to the Covenant.

7.2 As required under article 5, paragraph 2 (a), of the Optional Protocol, the Committee has ascertained that the same matter is not being examined under another procedure of international investigation or settlement.

7.3 Concerning the requirement that domestic remedies should be exhausted, the Committee has taken note of the State party's arguments that the authors had not exhausted domestic remedies when the case was submitted to the Committee and that they then continued to make use of domestic remedies that had not yet been exhausted. The Committee recalls that its position is that the issue of exhaustion of domestic remedies is to be assessed at the time of its consideration of the case, save in exceptional circumstances,[3] which do not arise in this communication.

7.4 As to the complaint of a violation of article 9, paragraphs 1 and 3, the Committee has taken note of the authors' arguments that the decisions of the Indictments Chamber concerning pretrial detention cannot be appealed against on points of law, according to article 495 (a) of the Code of Criminal Procedure. Since the State party has not contested this information and in view of the fact that the authors were released on 7 September 1999 by order of the Indictments Chamber, the Committee considers that domestic remedies have been exhausted.

7.5 With regard to the complaint of a violation of article 14, paragraph 3 (c), the Committee notes that the problem of the failure to respect the right to a trial within a reasonable time was raised by the authors in the domestic courts on numerous occasions. It further notes that on 26 January 1998 the authors lodged an application protesting against the delay incurred by the three experts appointed on 17 November 1996, i.e. 14 months earlier. The Committee accordingly finds that with regard to a possible violation of article 14, paragraph 3 (c), the communication is admissible.

7.6 Concerning the authors' arguments that the confiscation of their property is a violation of articles 7, 10, paragraph 1, 16 and 17 of the Covenant, the Committee considers that those allegations are insufficiently substantiated for the purposes of admissibility.

7.7 As to the complaints of a violation of article 14, paragraphs 1 and 2, the Committee considers that the authors' allegations are insufficiently substantiated for the purposes of admissibility.

7.8 The Committee finds that the authors' complaints of violations of articles 9, paragraphs 1 and 3, and 14, paragraph 3 (c), have been sufficiently substantiated and are admissible. Accordingly, it proceeds with the examination of the merits.

Consideration of the merits

8.1 The Human Rights Committee has considered the present communication in the light of all the written information made available to it by the parties, in accordance with article 5, paragraph 1, of the Optional Protocol.

8.2 As regards the complaints of violations of article 9, paragraphs 1 and 3, the Committee notes that the authors' allegations concern the duration and the arbitrary nature of their detention. The Committee observes that the authors were held in pretrial detention for three and a half years from 9 March 1996 to 7 September 1999. The Committee has taken note of the information provided by the State party concerning the charges brought against the authors, the legal bases for holding them and the procedural requirements stemming from the Code of Criminal Procedure. It has furthermore noted the State party's assertion that the complexity of the case had required a series of expert reports, leading up to the decision of the Indictments Chamber of 30 December 1998 to refer the accused to the trial court, and that this procedure, and consequently the detention of the authors, had also been prolonged by the latter's appeal on points of law on 31 January 1999.

8.3 The Committee reaffirms its prior jurisprudence that pretrial detention should be the exception and that bail should be granted, except in situations where the likelihood exists that the accused would abscond or destroy evidence, influence witnesses or flee from the jurisdiction of the State party. The drafting history of article 9, paragraph 1, confirms that "arbitrariness" is not to be equated with "against the law", but must be interpreted more broadly to include elements of inappropriateness, injustice, lack of predictability and illegality. Further, continued pretrial detention following legal arrest must not only be lawful, but also reasonable in all respects. The Committee is of the view, however, that the State party has not sufficiently justified its arguments, either concerning the reasons for placing the authors in pretrial detention or concerning the complexity of the case such that it might justify keeping them in custody.

8.4 The Committee further considers that the authors' responsibility for delays in the procedure due to their appeals has not been shown. It is of the view that the succession of expert reports was solely the result of a decision by the authorities and in the case of some of them on grounds that cannot be regarded as reasonable. It notes the decision of the Indictments Chamber in its ruling of 10 February 1998 to relieve the panel of three experts of their mission because of their excessive fees, although these experts had been appointed by the Chamber itself in a decision of 17 November 1996, following its rejection of the report of the first expert appointed on 30 March 1996. The Committee also notes that the first appeal by the authors on points of law led the Supreme Court to refer the case back to the Indictments Chamber because of violations of the rights of the defence relating to the expert reports. In the absence of further information or sufficiently convincing justification as to the need and reasonableness of keeping the authors in custody for three years and six months, the Committee finds that there was a violation of article 9, paragraphs 1 and 3.

8.5 Concerning the complaint of a violation of article 14, paragraph 3 (c), the Committee notes that although the authors were charged with a number of criminal offences on 9 March 1996, the investigation and consideration of the charges did not lead to a judgement of first instance until 16 July 2003, in other words seven years and three months after the charges had been brought. Under article 14, paragraph 3 (c), everyone has the right "to be tried without undue delay". In the Committee's opinion, the arguments put forward by the State party cannot justify excessive delays in judicial procedure. The Committee also considers that the State party has not demonstrated that the complexity of the case and the appeal by the authors on points of law were such as to explain that delay. It therefore finds a violation of article 14, paragraph 3 (c).

9. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts before it reveal violations of article 9, paragraphs 1 and 3, and article 14, paragraph 3 (c), of the Covenant.

10. In accordance with article 2, paragraph 3 (a), of the Covenant, the State party is under an obligation to provide the authors with appropriate reparation. The State party is also under an obligation to take measures to prevent similar violations in the future.

11. Bearing in mind that, by becoming a party to the Optional Protocol, the State party has recognized the competence of the Committee to determine whether or not there has been a violation of the Covenant and that, pursuant to article 2 of the Covenant, that State party has undertaken to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the Covenant and to provide an effective and enforceable remedy in the event that a violation has been established, the Committee wishes to receive from the State party, within 90 days, information about the measures taken to give effect to the Committee's Views. The State party is also requested to publish the Committee's Views.

[Adopted in English, French and Spanish, the French text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the Committee's annual report to the General Assembly.]

Notes

[1] The State party's submissions date from November 2002.

[2] The State party's submissions date from November 2002.

[3] See communication No. 925/2000, *Kuok Koi v. Portugal*, decision of inadmissibility adopted on 22 October 2003, para. 6.4.

V. Communication No. 1100/2002, *Bandazhewsky v. Belarus*

(Views adopted on 28 March 2006, eighty-sixth session)*

Submitted by:	Yuri Bandajevsky (represented by counsel)
Alleged victim:	The author
State party:	Belarus
Date of communication:	19 April 2002 (initial submission)
Subject matter:	Detention ordered under anti-terrorist legislation; alleged persecution because of public expression of opinions critical of State party's Government
Procedural issues:	Level of substantiation of claim; non-exhaustion of domestic remedies
Substantive issues:	Unlawful detention; conditions of detention, unfair trial, freedom of opinion/right to impart information
Articles of the Covenant:	9, 10, 14, 19
Articles of the Optional Protocol:	2 and 5, paragraph 2 (a)

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 28 March 2006,

Having concluded its consideration of communication No. 1100/2002, submitted to the Human Rights Committee by Yuri Bandajevsky under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the author of the communication and the State party,

Adopts the following:

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* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Nisuke Ando, Mr. Prafullachandra Natwarlal Bhagwati, Ms. Christine Chanet, Mr. Maurice Glèlè Ahanhanzo, Mr. Edwin Johnson, Mr. Walter Kälin, Mr. Ahmed Tawfik Khalil, Mr. Rajsoomer Lallah, Mr. Michael O'Flaherty, Ms. Elisabeth Palm, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Ivan Shearer, Mr. Hipólito Solari-Yrigoyen and Mr. Roman Wieruszewski.

Views under article 5, paragraph 4, of the Optional Protocol

1. The author of the communication is Yuri Bandajevsky, a citizen of Belarus, born in 1957, who at the time of submission of the communication was imprisoned in Minsk, Belarus. He claims to be a victim of violations by Belarus of his rights under articles 9, 10, 14 and 19 of the International Covenant on Civil and Political Rights. He is represented by counsel.

Factual background

2.1 The author was a professor and Rector of the State Institute of Medicine in Gomel, Belarus. In 1999, a criminal case was filed against him under article 169 of the Criminal Code of Belarus (1960 version), on a charge of having accepted bribes. He was arrested on 13 July 1999, subsequently released, but asked not to leave the State territory. On 18 June 2001, the Military Chamber (Collegium) of the Supreme Court convicted him of having accepted bribes, pursuant to article 430 of the Criminal Code (1999 version), and sentenced him to 8 years of imprisonment. According to the author, the Court held that in 1997, when he was Rector of the Medical Institute, he proposed to the Education Director to collect money as bribes from parents of applicants to study at the Institute.

2.2 The author affirms that he has exhausted all domestic remedies.

The complaint

3.1 The author claims a violation of article 9, paragraph 1, of the Covenant: he notes that he was arrested on 13 July 1999, with approval of the Procurator General, and detained for 30 days under a Presidential Decree of 21 October 1997 "On the urgent measures for the fight of terrorism and other particularly dangerous violent crimes". He claims that he was later charged with having accepted bribes, contrary to article 169 (3) of the Criminal Code of Belarus. This offence, he notes, has no relation with terrorism or other violent or particularly dangerous crimes. According to him, there was no justification for his arrest and detention.

3.2 The author claims that he was not informed of the charges against him upon his arrest on 13 July 1999, and that he was accused of having received bribes only 3 weeks later, on 5 August 1999, in violation of article 9, paragraph 2, of the Covenant. He also claims that he was deprived of the possibility of having his detention reviewed, in violation of article 9, paragraph 4, of the Covenant.

3.3 He also claims that, during his detention, he did not receive any medical care, commensurate to his state of health, in violation of article 10, paragraph 1, of the Covenant. He states that only after an abrupt deterioration of his state of health, he was hospitalized on 8 August 1999 in the regional hospital of Mogilev; on 18 September 1999, at the request of the authorities, he was again placed in detention. He further claims that he was unable to have any items for personal hygiene or adequate personal facilities. The conditions of detention did not allow the author to consult scientific or artistic literature, or press from independent media, "corresponding to his background and profession".

3.4 He claims that during his pretrial detention, the conditions of detention were identical to those of convicted prisoners, in violation of article 10, paragraph 2, of the Covenant.

3.5 The author reiterates that the charges against him were notified only on 5 August 1999 (23 days after his arrest), and claims that until this moment, he was deprived of the possibility to defend himself against those charges, in violation of article 14, paragraph 3 (a), of the Covenant. He alleges that between 6 August 1999 and 18 September 1999, during his stay in hospital, he was not allowed to consult his lawyer, in violation of article 14, paragraph 3 (b), of the Covenant. Allegedly, the Court did not allow his counsel - Mr. G.P. from the Belarusian Helsinki Committee - to represent him in court, in violation of article 14, paragraph 3 (d).

3.6 In relation to article 14, the author claims that his guilt was not proven in Court. The only evidence against him were the allegedly contradictory declarations of two witnesses - Mr. Shaichek and Mr. Ravkov; the judgement allegedly did not refer to other evidence. It is stated that the Court considered only the arguments of benefit to the prosecution, ignoring procedural violations committed during the investigation and in court. According to the author, this proves the lack of impartiality of the Court, and that the investigation and the court's proceedings were biased and incomplete. He adds that Mr. Ravkov had initially made a deposition on 12 July 1999, accusing him of taking bribes, but later, in court, he retracted his deposition, stating that initially he was under pressure from the investigators (interrogation longer than legally authorized, with no food or sleep, and use of threats against his wife and daughter; he also claimed that a psychotropic substance had been added to his food). The Court allegedly ignored these declarations and took into account only the initial ones.

3.7 The author contends that contrary to article 14 of the Covenant, courts in Belarus are not independent because the President of the Republic has sole authority to appoint and dismiss judges; before their formal designation, they go through a probationary period, without any guarantee that they will ultimately be appointed. In the author's opinion, the lack of independence of judges is also confirmed by a report of the Special Rapporteur on the independence of judges and lawyers of the United Nations Commission on Human Rights (June 2000).

3.8 The author further claims that under article 1 of the Decision of the Supreme Council (Supreme Chamber of the Belarusian Parliament) on the "interim situation in the designation of people's jurors (assessors)" (7 June 1996), all Belarusian citizens of above 25 years can become jurors, and citizens of 25 years and in active military service - can become jurors in military courts. However, in his case, only the President of the Military Chamber of the Supreme Court was in active military service, and none of the jurors. This is said to raise issues under article 14 of the Covenant.

3.9 Finally, the author claims that his rights under article 19, paragraphs 1 and 2, of the Covenant were violated. He contends that in April 1999, during a Parliamentary Session on the consequences of the Chernobyl disaster, he produced a critical report on the effects of the event for Belarus, which was very different from the official position of the Government. In the author's opinion, his criticism was the true reason for his persecution and dismissal from the Medical Institute.

State party's observations on admissibility

4. By submission of 17 September 2002, the State party argued that the communication should be declared inadmissible, because "the same matter" was already registered and was being examined by another international body of settlement, i.e. the United Nations Educational,

Scientific and Cultural Organization (UNESCO), under the individual complaints procedure before the Executive Board's Committee on Conventions and Recommendations of UNESCO. The author presented no comments in this regard.

Committee's admissibility decision

5. On 7 July 2003, at its seventy-eighth session, the Committee examined the admissibility of the communication. It noted the State party's challenge to admissibility, and considered that the complaints procedure before the Executive Board's Committee on Conventions and Recommendations of UNESCO is extra-conventional, without any obligation of the State party concerned to cooperate with it; that no conclusion of violation or non-violation of specific rights by a given State is made in the examination of individual cases; and that such an examination ultimately does not lead to any authoritative determination of the merits of a particular case. The Committee concluded that the UNESCO complaints procedure does not constitute another "procedure of international investigation or settlement" in the sense of article 5, paragraph 2 (a), of the Optional Protocol, and having also noted the author's statement that domestic remedies were exhausted, declared the communication admissible.

State party's observations on the merits

6.1 By note verbale of 20 January 2004, the State party notes that the author was found guilty of being, in his personal and official capacity, a member of a group that had conspired to receive bribes in large amounts.[1] He was arrested on 13 July 1999 on the basis of a written statement of 12 July 1999 of his colleague Ravkov to the Gomel Regional Prosecutor, in which the latter voluntarily informed the prosecutor about the bribes he received for the admission of new students to the Institute. Ravkov had described, in detail, dates and names of persons from whom he received bribes that he transmitted to the author, the exact amounts received, and the functioning of the group. He had affirmed in writing that his confessions were made under no constraint, and that he was informed of his criminal responsibility in case of giving false information against the author.

6.2 For the State party, the author's arrest was carried out with the agreement ("sanction") of a prosecutor and at the moment of arrest, the author was informed of the reasons and grounds for his arrest. His arrest is said to be grounded on and made in accordance with Presidential Decree of 21 October 1997; the Decree was applied in his case as it applies not only to suspects of "terrorism and other particularly dangerous violent crimes", but also to individuals who "lead a criminal organization, an organized criminal gang, or belong to it". The State party adds that in the light of Ravkov's deposition, the existence of an organized criminal group could not be excluded by the investigators.

6.3 From the criminal case file, it transpires that the author led a group set up with Ravkov and other individual. Under the provisions of the above-mentioned Decree, and after a verification of the facts by the preliminary investigation, and within the statutory 30-day delay, the author was served his indictment for bribery. His detention was extended with the approval of a prosecutor.

6.4 The State party explains that the author's detention was lawful, as he was charged with a serious crime, and that article 126 of the Criminal Procedure Code provides that in relation to those accused of having committed serious offences, preventive detention is justified by reference to the nature of the crime. In addition, the investigators had information that the author had exerted pressure on witnesses in the case, on subordinates at his Institute, thus obstructing the conduct of the investigation. The author was released in light of his health, after he signed a declaration that he would not leave the country, and was also allowed to continue his work. On 10 June 2001, however, he was arrested with a forged passport, when attempting illegally to cross the border to Ukraine.

6.5 The State party argues that during the investigation, the author received the necessary medical care. On 13 August 1999, his chronic illness intensified and he was treated at the Hospital of the Committee on the Execution of Penalties. On 13 December 1999, he was admitted for an examination in the National Cardiology Research Institute. He continued to receive the required medical care in the prison colony to which he was transferred. According to information provided by the Committee on the Execution of Penalties on 28 February 2003, the author had not requested medical assistance since September 2002 and visited the colony's medical unit only at the doctors' request. His mental and physical health is said to be satisfactory. No requests for detailed examination of his health were received from him, his lawyer or relatives.

6.6 According to the State party, the author was always assisted by a lawyer during the investigation and in court. Investigation proceedings, accusation, and consultation of the content of the criminal case, were all carried in a lawyer's presence and were co-signed by the latter. Exceptionally, no lawyer took part in certain proceedings (as during a cross-examination with Ravkov); this was due however to the author's request and was duly recorded. The author was informed by investigators and in court of his rights; these rights were also printed on the procedural forms that were examined and signed by him.

6.7 The State party recalls that G.P. was not allowed to act as the author's representative, because domestic law does not provide for such representation, and because he had no licence to practise as a lawyer in Belarus.

6.8 According to the State party, the preliminary investigation established that the author had received bribes from families of student applicants; he acted through Mr. Ravkov and members of examination commissions; all instances of bribes were duly examined during the investigation and in court (amount, currency, exact place and time of the transfer, etc.) In addition, various examination forms and questions on different subjects, as well as records with names of persons for whom bribes were given, were seized in the author's office.

6.9 The State party contends that the court concluded that Ravkov modified his testimony in court as a defence strategy. The allegation that he confessed under influence of psychotropic substances was duly examined by the court, including through psychiatric/psychological examinations, and was not confirmed. The author's guilt was established by testimony of other accused, cross-examinations, and other material evidence. He was charged with multiple receipt of bribes, acting in agreement within an organized group; preparation and attempted receipt of bribes on preliminary agreement with a group; and abuse of authority. On 12 December 2000, the case was sent to court; proceedings were instituted by the Supreme Court, given the public interest in the case and the author's notoriety. The proceedings were public and held in presence of representatives of international non-governmental organizations.

6.10 Under article 270 of the Criminal Procedure Code, the case was examined by the Military College of the Supreme Court, as Ravkov was a medical colonel of the reserve, and it was impossible to try him separately. As an example of objectivity and impartiality of the trial, several charges made by the investigators were dropped in court. In accordance with article 15 of the Covenant, the author was convicted under the provisions of a new law which applied lighter penalties than those at the time of commission of the offences. The form and the content of the judgement is said to be in compliance with the criminal procedure then in force. The court took into account the severe social repercussions of the crime (classified as "heavy" in the Criminal Code), as well as information on the personality of the accused and the existence of mitigating circumstances (e.g. positive references from the author's employer; his merits as an internationally recognized medical scientist; his health; and the fact that he had the charge of his children). Mr. Bandajevsky was sentenced for multiple acts of bribery to 8 years of imprisonment, coupled with a ban on the exercise of any administrative functions for 5 years.

6.11 On appeal, the criminal case was examined under the supervisory procedure by the Supreme Court, and the judgement was found lawful and just. According to the State party, if the Supreme Court had detected serious violations of the law, the judgement would have been cancelled.

6.12 The State party rejects the author's allegation that he was prosecuted because of his critical opinion on the authorities' reaction to the Chernobyl crisis, and affirms that in prison, the author has continued his research and has completed several scientific publications

6.13 According to the State party, the author has submitted no request for a pardon since October 2002. Pursuant to an Amnesty Law of 2002, his sentence was reduced by one year. According to articles 90 and 91 of the Criminal Code, his sentence could be substituted by a lighter one after serving not less than half of the initial sentence, which in the author's case would be after 6 September 2004. The issue of conditional early release could therefore be examined after 6 September 2005.

6.14 By note verbale of 10 March 2004, the State party informs the Committee that on 8 January 2004, the author's sentence was reduced by another year. It is stated that the author was placed on medical observation for "duodenal ulcer" and receives treatment. His health situation is said to be stable. It also submits the text of a report from the OSCE representative in Minsk, after his visit to Mr. Bandajevsky on 3 December 2003.

Author's comments on State party's submissions

7.1 By letters of 12 March, 26 April 2004, and 17 May 2005, the author reaffirms that his arrest was unlawful, and recalls that a preventive detention up to 30 days relates only to terrorism and other particularly serious crimes. He reaffirms that the conditions in the detention centre where he was held for 23 days were inadequate, and that this allegation was not refuted. He claims that he was not able to meet with his lawyer within 24 hours, nor was he promptly informed of the charges against him, and that "he could not exercise other procedural guarantees as a suspect".

7.2 In detention, the author allegedly developed acute peritonitis and had to be operated on "at the end of September 2003", due to inadequate medical attention. He had suffered from ulcers for a long time and claims that he is allowed to receive only 30 kg of parcels per trimester, while the prison diet is inadequate for his ailment.

7.3 He reiterates that he had requested Mr. G.P. to represent him in court, but on two occasions the Supreme Court allegedly dismissed the latter's requests to this effect. Mr. G.P. is a member of the Moscow Lawyers' Guild, and under the CIS[2] Convention[3] of 23 January 1993, Russian lawyers can practise in Belarus.

7.4 The author notes that the State party does not refute his allegations about the unlawful composition of the court and about the impossibility for him to file an appeal in cassation against the judgement of the Supreme Court.

7.5 As to the possibility of his conducting scientific research, the author claims that because of his detention, his contacts with foreign researchers are limited, and he is unable to use special equipment or to gain access to the latest scientific developments. Such articles as he wrote were mainly based on his memory. His computer has no Internet access and is used only for word processing, and he had no mobile phone access.

Additional submissions by the State party

8.1 On 16 December 2004, the State party submits that under article 22 of the Law on Collective Organizations (1994), organizations (such as NGOs) are allowed to represent rights and lawful interests of their own members. The author was not a member of the Belarusian Helsinki Committee, and in addition, he had requested Mr. G.P. to participate in the trial not as his representative, but as a NGO representative.

8.2 From 5 July 2001 to 1 June 2004, the author was held at the Minsk Correctional Colony No. 1. According to his medical records, during this period, he visited the medical service on twelve occasions, including for eight routine examinations in the dispensary, passed a number of specialized examinations, and was also hospitalized. He was given treatment commensurate with his health, and he received additional medicines from abroad. The State party denies that he was operated on for "peritonitis" on 1 October 2003, stating that the operation was in fact for "appendicitis", and that he was discharged as early as 6 October 2003.

8.3 On 26 May 2004, the Minsk Central District's Court changed the author's penitentiary regime and he was transferred to a Gazgalyi colony-village. Since 7 June 2004, he has worked as a guard in a private agricultural firm and lives outside the colony-village. He has received visits from foreign diplomats, journalists, and the Chairperson of the United Nations Working Group on Arbitrary Detention. On two occasions, he has been allowed to travel to Minsk, for a week. His family is free to visit him without limitation.

8.4 On 25 April 2005, the State party reaffirms that during his free time, the author is able to conduct scientific research. The administration's decision not to request his anticipated release was lawful and taken pursuant to the provisions of the Criminal Execution Code (CEC). On 21 September 2004, the author was granted a 7-day leave, but he returned only on 4 January 2005. During his absence, he omitted duly to inform the prison authorities or the police of the reasons for his absence, in violation of both the provisions of CEC and the colony's internal rules. During this period, he passed different examinations and received treatment in several medical institutions in Minsk, but from 27 September to 27 October 2004, and from 23 November to 3 January 2005, he was treated at a day hospital, whereas from 12 to 16 November 2004, he stayed at home.

8.5 The State party contends that during his treatment in Minsk, the author consulted different specialists and passed a number of examinations, following which he was prescribed appropriate medication. The author was able to visit the local (ordinary) medical institution in charge of the penitentiary colony.

8.6 By note verbale of 18 August 2005, the State party explained that on 5 August 2005, the Dyatlov regional court decided to release the author early and conditionally.

Additional comments by author

9.1 On 20 February 2005, the author reaffirmed that the detention centre where he was held between 13 July and 4 August 1999 was not even equipped with beds, so that detainees slept on the floor, with no visits with relatives or lawyers allowed.

9.2 As to the visits received, the author concedes that journalists, researchers, and other visitors were allowed to see him, but that this was possible only upon a specific authorization from the Ministry of Internal Affairs' Department on Execution of Penalties. He claims that several such requests for visits were denied.

9.3 He contends that on 31 January 2005, the penitentiary authorities refused to request his anticipated release, allegedly because they considered that he could not demonstrate that he was "rehabilitated", and also because he was absent from the colony, and refused to pay the fine of 35 million BLR. He affirms that his absence from the colony for 3 months was due to "clinical treatments for illnesses he contracted in prison".

9.4 On 1 June 2005, the author reiterated that his scientific work is limited to the analysing of data of his past research. According to him, his treatment in Minsk towards the end of 2004 had been approved by the chief of the penitentiary colony; he wrote to the colony and received the authority's agreement to be treated in Minsk, without informing him of any particular obligation to notify or to report to the police. He called the penitentiary twice a week, and regularly faxed copies of attestations and medical records; the penitentiary authorities checked his whereabouts on several occasions, by calling the medical institutions concerned and asking to talk to him.

Examination of the merits

10.1 The Human Rights Committee has considered the communication in the light of all the information made available to it by the parties, as required by article 5, paragraph 1, of the Optional Protocol.

10.2 The Committee has noted the author's claim that his arrest on 13 July 1999 was "groundless", that he was not informed on the reasons upon arrest, was not able to meet with his lawyer within the first 24 hours, and was indicted for bribery only 23 days later, and that the Presidential Decree "On the urgent measures for the fight of terrorism and other particularly dangerous violent crimes" was applied to him to limit his defence rights. The State party claims that the author's arrest and pretrial detention were lawful, as a criminal case for bribery had been opened on 12 July 1999 against him; that there were grounds for believing that he was a leader of a criminal group, and that the investigators had information that he exercised pressure on witnesses of the case. According to the State party, the author's arrest under the provisions of the Decree was fully justified, as the crime he was suspected of was serious; he was informed of the reasons for arrest, and was accused within 23 days, and also he was represented by a lawyer throughout the preliminary investigation. On the basis of the information before it, the Committee concludes that there has been no violation of article 9, paragraph 1.

10.3 However, the author claimed that he was arrested and detained for 23 days under Decree No. 21 (1997), without any possibility to challenge the lawfulness of his detention before a court, as those detained under this Decree are not allowed to do so. This allegation has not been refuted by the State party, which only noted that the author's arrest and subsequent detention were subject to previous approval by a public prosecutor. The Committee recalls,[4] first, that it is inherent to the proper exercise of judicial power, that it be exercised by an authority which is independent, objective and impartial in relation to the issues dealt with. It further considers that the public prosecutor cannot be characterized as having the institutional objectivity and impartiality to be considered as an "officer authorized to exercise judicial power" within the meaning of article 9, paragraph 3.[5] In the circumstances, the Committee concludes that the author's rights under article 9, paragraph 3, of the Covenant, were violated.

10.4 In light of the above finding, the Committee considers that the author's right under article 9, paragraph 4, of the Covenant, was also violated.

10.5 The Committee notes the author's allegations under article 10, paragraph 1, about the lack of appropriate medical care and on the way he was treated medically in detention. The State party in turn provides detailed information on the type of medical treatment, clinical examinations and hospitalizations the author received or underwent while in detention. It also affirms that neither the author nor his relatives or his lawyer complained to the competent authorities or in court about these issues. This is not refuted by the author. In these circumstances, the Committee considers that there is no violation of article 10, paragraph 1.

10.6 The Committee has noted the author's allegations, that, contrary to article 10, paragraph 1, the conditions of detention in the Gomel detention centre, where he was held from 13 July 1999 to 6 August 1999, were inappropriate for long stays, and that the centre was not equipped with beds; that, in general, he did not have items of personal hygiene or adequate personal facilities. The State party has not refuted these allegations. In the circumstances, the Committee must give them due weight, and it concludes that the author's conditions of detention reveal a violation of his rights under article 10, paragraph 1, of the Covenant.

10.7 The author has claimed that during his preliminary detention, his conditions of detention were "identical to those of convicted prisoners". Even though the State party has not commented on this, the Committee notes that the author's allegation remains vague and general. Accordingly, and in the absence of any other pertinent information, the Committee concludes that the facts before it do not reveal any violation of the author's rights under article 10, paragraph 2.

10.8 The author has further claimed that the State party's courts are not independent because judges are nominated by the President. The State party has not commented on this. In the absence of further relevant information from the author to the effect that he was personally affected by the alleged lack of independence of the courts that tried him, however, the Committee considers that the facts before it do not disclose a violation of article 14, paragraph 1, on this count.

10.9 The author alleges, again in general terms, a violation of article 14, paragraph 1, in that his guilt was not proven in court, that the court proceedings were biased, incomplete, and that the court considered only the arguments of the prosecution, and that the judgement was based only on Ravkov's deposition that the latter retracted in court. The State party replies, in detail, that the court had considered Ravkov's retraction as a defence strategy, and that the author's guilt was established by several other testimonies and other evidence. The Committee notes that the above claims relate primarily to the evaluation of facts and evidence. It recalls its jurisprudence that it is generally for the courts of States parties to the Covenant to evaluate facts and evidence in a particular case, unless it can be ascertained that it was clearly arbitrary or amounted to a denial of justice.[6] The Committee considers that the material before it do not reveal that the author's trial had suffered from such defects, and the Committee considers that the facts before it do not disclose a violation of the author's rights under article 14, paragraph 1.

10.10 Further in relation to article 14, the author claims that he was sentenced by the Military Chamber of the Supreme Court which was sitting in an unlawful composition, as pursuant to a decision of the Supreme Council of Belarus of 7 June 1996, people's jurors (assessors) in military courts must be in active military service, whereas in his case, only the presiding judge was a member of the military but not the jurors. The State party has not refuted this allegation and merely stated that the trial did not suffer from any procedural defect. The Committee considers that the unchallenged fact that the court that tried the author was improperly constituted means that the court was not established by law, within the meaning of article 14, paragraph 1, and thus finds a violation of this provision on this count.

10.11 The author has claimed that since he was charged only on 5 August 1999 (23 days after his arrest), he was deprived of the possibility to defend himself properly, in violation of article 14, paragraph 3 (a), of the Covenant. He also claimed that in violation of article 14, paragraph 3 (b), he was not allowed to see his lawyer between 6 August 1999 and 18 September 1999, during his stay in hospital. The State party refutes these allegations and argues that he was always assisted by a lawyer, and was informed both by the investigators and in court of his procedural defence guarantees. On the basis of the material before it, the Committee considers that there has been no violation of article 14, paragraph 3 (a) and (b).

10.12 As to the author's claim under article 14, paragraph 3 (d), that on two occasions the Supreme Court rejected his request to be represented by G.P., a member of the Belarusian Helsinki Committee, the Committee notes the State party's objection that the author was represented by another lawyer, and that G.P. had asked to represent him only in his quality as NGO representative, and that also he had no Belarusian lawyer's licence. The author has replied that G.P. was a member of the Moscow Bar Association and could have practised in Belarus under a specific CIS Agreement. He has however not challenged the State party's claim that he had requested this lawyer to participate in the trial not as his own representative but as a NGO representative. In the circumstances, the Committee concludes that there has been no violation of article 14, paragraph 3 (d), in relation to this allegation.

10.13 The author has claimed that his sentence was not susceptible of cassation appeal and became executory immediately. The State party affirms that the case was examined by the Supreme Court under a supervisory procedure which reviewed the first instance judgement, and that if the Supreme Court had detected violations of the law, the judgement would have been cancelled. The Committee notes, however, that the judgement stipulates that it could not be reviewed by a higher tribunal. The supervisory review invoked by the State party only applies to already executory decisions and thus constitutes an extraordinary mean of appeal which is dependent on the discretionary power of judge or prosecutor. When such review takes place, it is limited to issues of law only and does not permit any review of facts and evidence. The Committee recalls that even if a system of appeal may not be automatic, the right to appeal within the meaning of article 14, paragraph 5, imposes on States parties a duty substantially to review conviction and sentence, both as to sufficiency of the evidence and of the law.[7] In the circumstances, the Committee considers that the supervisory review cannot be characterized as an "appeal", for the purposes of article 14, paragraph 5, and that this provision has been violated.[8]

10.14 Finally, on the author's claim under article 19, in that he was persecuted because of his criticism of certain Government positions, especially on the consequences of the Chernobyl disaster, the Committee notes that the State party has repeatedly emphasized that the author was prosecuted and sentenced for bribery only. In the absence of any other relevant information on this particular issue, and given the general nature of the author's claim, the Committee considers that there has been no violation of article 19 of the Covenant.

11. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts before it disclose a violation of Mr. Bandajevsky's rights under articles 9, paragraphs 3 and 4; 10, paragraph 1; and 14, paragraphs 1 and 5, of the Covenant.

12. In accordance with article 2, paragraph 3 (a), of the Covenant, the State party is under an obligation to provide Mr. Bandajevsky with an effective remedy, including appropriate compensation. The State party is also under an obligation to prevent similar violations in the future.

13. Bearing in mind that, by becoming a party to the Optional Protocol, the State party has recognized the competence of the Committee to determine whether there has been a violation of the Covenant or not and that, pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory or subject to its jurisdiction the rights recognized in the Covenant and to provide an effective and enforceable remedy in case a violation has been established, the Committee wishes to receive from the State party, within 90 days, information about the measures taken to give effect to the Committee's Views. The State party is also requested to publish the Committee's Views.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the Committee's annual report to the General Assembly.]

Notes

[1] I.e. for the crime prescribed by article 430 (2) of the Criminal Code of Belarus article 430 (2) of the Belarusian Criminal Code: receipt of bribes.

[2] Community of Independent States.

[3] CIS Convention on Legal Assistance and Relations on Civil, Family, and Criminal Cases.

[4] See *Kulomin v. Hungary*, communication No. 521/1992, Views adopted on 22 March 1996, para. 11.3.

[5] See Views on communication No. 1218 /2003, *Platonov v. Russian Federation*, adopted 1 November 2005, para. 7.2.

[6] See communication No. 541/1993, *Errol Simms v. Jamaica*, Inadmissibility decision adopted on 3 April 1995, para. 6.2.

[7] See *Aliboev v. Tajikistan*, communication No. 985/2001, Views adopted on 18 October 2005; *Khalilov v. Tajikistan*, communication No. 973/2001, Views adopted on 30 March 2005, *Domukovsky et al. v. Georgia*, communications No. 623-627/1995, Views adopted on 6 April 1998, and *Saidova v. Tajikistan*, communication No. 964/2001, Views adopted on 8 July 2004.

[8] See decision in *Gelazauskas v. Lithuania*, communication No. 836/1998, Views adopted on 17 March 2003, and *Domukovsky et al. v. Georgia*, communications Nos. 623-624, and 627-628/1995, Views adopted on 6 April 1998.

W. Communication No. 1123/2002, *Correia de Matos v. Portugal* (Views adopted on 28 March 2006, eighty-sixth session)*

Submitted by:	Carlos Correia de Matos (not represented by counsel)
Alleged victim:	The author
State party:	Portugal
Date of communication:	1 April 2002 (initial submission)
Subject matter:	Right to defend oneself in person
Procedural issues:	Status of "victim"; amnesty; final decision of inadmissibility by the European Court of Human Rights; exhaustion of domestic remedies closely linked to substantive issues
Substantive issues:	Right to defend oneself in person; fair trial; proper dispensation of justice
Articles of the Covenant:	14, paragraph 3 (d)
Articles of the Optional Protocol:	5, paragraph 2 (a)

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 28 March 2006,

Having concluded its consideration of communication No. 1123/2002, submitted to the Human Rights Committee on behalf of Carlos Correia de Matos under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the author of the communication, and the State party,

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* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Nisuke Ando, Mr. Prafullachandra Natwarlal Bhagwati, Ms. Christine Chanet, Mr. Maurice Glèlè Ahanhanzo, Mr. Edwin Johnson, Mr. Walter Kälin, Mr. Ahmed Tawfik Khalil, Mr. Rajsoomer Lallah, Mr. Michael O'Flaherty, Ms. Elisabeth Palm, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Ivan Shearer, Mr. Hipólito Solari-Yrigoyen and Mr. Roman Wieruszewski.

The text of an individual opinion co-signed by Committee members Ms. Elisabeth Palm, Mr. Nisuke Ando and Mr. Michael O'Flaherty and another separate opinion signed by Committee member Sir Nigel Rodley are appended to the present document.

Adopts the following:

Views under article 5, paragraph 4, of the Optional Protocol

1. The author is Mr. Carlos Correia de Matos, a Portuguese citizen, born on 25 February 1944 and residing at Viana do Castelo, Portugal. He states that he is a victim of a violation by Portugal of article 14, paragraph 3 (d), of the International Covenant on Civil and Political Rights. The author is not represented by counsel. The Covenant and the Optional Protocol came into force for Portugal on 15 June 1978 and 3 May 1983 respectively.

Factual background

2.1 The author is an auditor and lawyer in Portugal. However, his name was temporarily removed from the Bar Council's roll by decision dated 24 September 1993 of the Bar Council, which considered the exercise of the profession of lawyer to be incompatible with that of auditor.

2.2 On 4 July 1996, the author was committed to trial at the Ponte de Lima District Court. He was accused of insulting a judge. The investigating magistrate officially assigned a lawyer to represent the author contrary to his wishes, as he considered he was entitled to defend himself in person.

2.3 The author appealed against the committal order (*despacho de pronúncia*) to the Oporto Court of Appeal (*Tribunal da Relação do Porto*). The investigating magistrate declared the appeal inadmissible, however, on the grounds that it had not been lodged by a lawyer, and the appellant could not defend himself in person. A complaint by the author to the President of the Court of Appeal was dismissed on the same grounds.

2.4 The author then lodged a constitutional appeal with the Constitutional Court. In an order of 16 May 1997, the President of the Court of Appeal ruled that the issue raised by the author, that he was not allowed to defend himself in person, should be decided by the Constitutional Court, and accordingly ordered the appeal to be referred to that Court.

2.5 On 23 September 1997, the judge rapporteur at the Constitutional Court, noting that the applicant's name had been temporarily removed from the Bar Council's roll, requested him to instruct a lawyer, pursuant to the Constitutional Court Act. On 6 October, the author submitted that the provision obliging him to appoint a defence lawyer was unconstitutional, and requested consideration of his appeal. In an order of 4 November 1997, the judge rapporteur ruled that the provision in question was not in conflict with the Constitution and once again invited the author to instruct a lawyer, failing which the Court would refuse to hear his appeal. On 19 November 1997, the author asked that the matter be submitted to a committee of judges.

2.6 In a ruling of 13 October 1999, a committee of judges upheld the order of 4 November 1997, stressing that neither the provision in the Constitutional Court Act nor the arrangements provided for under the Code of Civil Procedure were unconstitutional. The Constitutional Court accordingly invited the author to instruct a lawyer.

2.7 Meanwhile, the Ponte de Lima Court scheduled a hearing for 15 December 1998. When it was called to order, the author declared that he had asked to defend himself, but this had been refused by the judge. A court-appointed lawyer was then designated.

2.8 Under a judgement of 21 December 1998, the Court found the author guilty and sentenced him to 170 day-fines (*jours-amende*), i.e. 600,000 Portuguese escudos in damages to the judge concerned.

2.9 The author lodged an appeal which the judge decided not to refer to the Court of Appeal, considering that it was merely a statement by the author within the meaning of article 98 of the Code of Penal Procedure. A second application under the same heading was rejected by an order of 23 March 1999. The author brought in a final application on 18 January 2001 against an order of 4 January 2001, and the matter was referred to the Court of Appeal on 7 February 2001. The judge-president of the Court of Appeal confirmed on 12 June 2001 that the matter was still before the Third Section of the Court (case No. 268/01).

2.10 On 12 May 1999, Amnesty Act No. 29/99 was adopted. On 3 December 1999, the judge at the Ponte de Lima Court, considering that this Act should apply, cancelled the author's sentence. On 14 August 2000, however, the author learned of enforcement proceedings instituted by the prosecutor in respect of the amount payable to the judge in damages.

2.11 On 2 February 2000, following a request by the author to that effect, the judge rapporteur at the Constitutional Court cancelled the appeal still pending before that court.

The complaint

3.1 The author complains he was not permitted to defend himself, in contravention of article 14, paragraph 3 (d), of the Covenant, and considers that he did not have a fair trial.

3.2 On 17 April 1999, the author also filed a claim with the European Court of Human Rights, which ruled it partly inadmissible on 14 September 2000[1] and inadmissible overall on 15 November 2001,[2] on the grounds that the application was ill-founded.

State party's submissions on admissibility and the merits

4.1 In a note verbale dated 3 January 2003, the State party contests the admissibility of the communication. In the first place, article 5, paragraph 2 (a), of the Optional Protocol and article 96 (e) (formerly 90 (e)) of the rules of procedure of the Committee provide that the latter shall not consider an application already examined under another international judicial body. As the author's claim has also come before the European Court of Human Rights, which has already ruled on its admissibility and merits, the State party considers that the Committee cannot examine the present claim, in part because of the risk of inconsistency in international decisions.

4.2 Secondly, the author failed to respect the rule that he must submit his claim within six months from the date of the final domestic decision. Thirdly, the author does not have the status of victim, inasmuch as during the proceedings he was granted an amnesty that expunged the effects of his conviction.

4.3 Finally, the author has not exhausted all domestic remedies, inasmuch as he lodged an appeal with the Constitutional Court but the Court has been unable to consider it, given the author's refusal to instruct a lawyer. According to the State party, as the appeal to the Constitutional Court was not properly submitted, the author prevented consideration of the question and so has not exhausted all domestic remedies.

4.4 In its submissions of 1 April 2003, the State party reiterates its arguments on the inadmissibility of the communication and provides comments on the merits. It points out that the right to defend oneself in person, provided for in article 14, paragraph 3 (d), of the Covenant, demands that there should be no hindrance to the accused's right to self-representation. This means that the accused should be able to make a personal submission of his version of the facts, and that a defence counsel should not be imposed on him, leaving him free to choose who will defend him.

4.5 The State party points out that the right to defend oneself is a right enshrined in Portugal's penal procedure. Articles 138 and 140 of the Code of Penal Procedure allow the accused to be given a hearing and to express directly and personally his position with regard to the facts, and article 332 of the same Code requires the accused to be present in court.

4.6 In the State party's view, a distinction should be drawn between personal defence, which allows the accused to be given a hearing and to submit his position with regard to the facts directly, and technical defence, to be conducted by a lawyer, for certain stages of the proceedings such as hearings or appeals. The right to defend oneself is not absolute: in certain circumstances States may require legal representation by a lawyer.[3] Though article 14, paragraph 3 (d), of the Covenant recognizes the right of the accused to defend himself in person or with legal assistance, it does not specify under what conditions and leaves to States parties the choice of the appropriate means to enable their judicial systems to guarantee the defence.

4.7 The State party maintains that the requirement for a lawyer to act at certain stages of the proceedings is a sufficient and proportionate means for States to employ in order to provide greater guarantees and more strictly defend the accused, given the type and specific nature of the issues raised in criminal proceedings.

Author's comments on the State party's submissions

5.1 In his comments of 4 August 2003, the author contests the arguments of the State party. First of all, he considers that Portugal's Code of Penal Procedure departs from article 14 of the Covenant in stipulating that in certain cases, including attendance at hearings and the lodging of appeals, the presence of a defence lawyer is obligatory, and if the accused fails to appoint a lawyer, the court must assign him one. The author also refers to the case law of the Portuguese Supreme Court (*Supremo Tribunal de Justiça*) under which the accused cannot act in person in criminal proceedings, even if he is a lawyer or a judge. Finally, the author considers that the reference by the State party to the ruling of the European Court of Human Rights in relation to the case of *Croissant v. Germany*, 25 September 1992, is not relevant, as on that occasion the Court decided that the assignment of a third lawyer to an appellant who did not wish to assume his own defence was not in breach of the European Convention.

5.2 With regard to admissibility, the author explains that the claim which he has lodged with the Committee differs from the case heard by the European Court. First of all, the Court only considered the events relating to the judgement of the Court of first instance of 15 December 1998. Since then, he appealed against the judgement and is still awaiting a decision. Moreover, the point of law raised relates to article 14 of the Covenant, not article 6 of the European Convention on Human Rights; the tenor of those provisions is different.

According to the author, in addition to the breach of the basic guarantee set out in article 14, paragraph 3 (d) and (e), there has also been a violation of paragraphs 1 and 5 of that article, namely, the right to a fair trial in connection with the judgement, on appeal, regarding the civil obligations resulting from an unlawful criminal conviction.

5.3 Lastly, article 5, paragraph 2 (a), of the Optional Protocol to the Covenant rules out consideration by the Committee of any communication if the same matter is "being examined" under another procedure of international investigation or settlement, not if the matter has already been examined.

5.4 The author points out that the rule requiring a claim to be lodged within six months of the final decision does not apply to the Committee. As to his status as victim, the amnesty granted by the Court of Ponte de Lima on 3 December 1999 did not expunge his sentence to pay damages to the judge in question and that he can therefore still claim to be a victim.

5.5 So far as the exhaustion of domestic remedies is concerned, the author concedes that he has not exhausted domestic remedies given the application he filed on 18 January 2001. He maintains, however, although without laying a complaint for a violation of article 14, paragraph 3 (c), of the Covenant, that he has been waiting for more than four years for a decision from the Appeals Court, and this does not constitute an appeals procedure functioning within a reasonable lapse of time. He also explains that he raised before the Constitutional Court the question of his right to defend himself personally, and that the Constitutional Court's decision did not take account of the fact that the temporary removal of his name from the Bar Council's roll was wrongful.

5.6 On the merits, the author points out that a breach of article 14, paragraph 3 (d), is manifest in Portuguese legislation, whereas other States' laws[4] allow an accused to defend himself in person. At the judicial level there is also a breach of article 14, paragraph 3 (d), given the decision of the Portuguese courts to assign him a lawyer against his will. The author notes the distinction between personal defence and technical defence compulsorily provided by a lawyer. He considers, however, that the way personal defence is guaranteed under Portuguese laws limits the accused to a passive role, and asserts that the limits to personal defence should not apply when the accused is a lawyer himself.

Consideration of admissibility

6.1 Before considering any claim contained in a communication, the Human Rights Committee must, in accordance with rule 93 of its rules of procedure, decide whether or not the communication is admissible under the Optional Protocol to the Covenant.

6.2 The Committee cannot accept the argument by the State party that the communication is inadmissible owing to the Committee's lack of competence, the present communication having already been considered by the European Court of Human Rights: on the one hand, article 5, paragraph 2 (a), of the Optional Protocol only applies when the same matter is "being examined" under another procedure of international investigation or settlement, and on the other, Portugal has entered no reservation to article 5, paragraph 2 (a), of the Optional Protocol.

6.3 With regard to the status of victim, the Committee has noted the State party's argument that the author cannot claim to be a "victim" within the meaning of article 1 of the Optional Protocol inasmuch as he has been awarded an amnesty that erased the effects of his conviction. The Committee notes that the amnesty of the Court of Ponte de Lima dated 3 December 1999 did not expunge the award of damages against the author. The Committee concludes that the author can therefore claim to be the victim of a breach of the Covenant.

6.4 As to the State party's argument on the deadline of six months for submitting communications, the Committee points out that this rule cannot be used in the present case, since it is not explicitly provided for by the Optional Protocol or established by the Committee.

6.5 So far as the exhaustion of domestic remedies is concerned, the Committee has taken note of the arguments advanced by the State party maintaining that the author's appeal to the Constitutional Court over the right to defend himself in person could not be considered because of his failure to instruct a lawyer, meaning that he had not exhausted all the domestic remedies. Having also taken note of the author's arguments, the Committee remarks that the only reason why the Constitutional Court has not examined the appeal is that the author did not instruct a lawyer but asked to defend himself in person. In these circumstances, the Committee considers that the exhaustion of domestic remedies is closely linked to the issue of whether the author could claim to defend himself in person in the proceedings against him. The Committee considers that these arguments should be taken up when the merits of the communication are examined.

Consideration of the merits

7.1 The Human Rights Committee has considered the present communication in the light of all the information made available by the parties, as provided in article 5, paragraph 1, of the Optional Protocol.

7.2 The Committee has taken note of the arguments submitted by the State party recalling that articles 138-140 of the Portuguese Code of Penal Procedure guarantee the right to defend oneself in person and the references to the decision of the European Court of Human Rights. The State party asserts that the right to defend oneself in person is not absolute, and in this respect draws a distinction between personal defence (allowing the accused to be given a hearing and to state his position on the facts at issue) and technical defence (to be represented by a lawyer at certain stages of the proceedings). It also considers that article 14, paragraph 3 (d), of the Covenant does not specify the way defence is to be conducted, and leaves to States parties the choice of the appropriate means to enable their judicial systems to guarantee the defence. Finally, the Committee takes note of the author's position as a lawyer himself, and his arguments that he has an absolute right to defend himself in person at every stage of the proceedings, failing which the fairness of the trial would be tainted.

7.3 The Committee notes that article 14, paragraph 3 (d), of the Covenant provides that everyone accused of a criminal charge shall be entitled "to defend himself in person or through legal assistance of his own choosing". The two types of defence are not mutually exclusive. Persons assisted by a lawyer retain the right to act on their own behalf, to be given a hearing, and to state their opinions on the facts of the case. At the same time, the Committee considers that the wording of the Covenant is clear in all official languages, in that it provides for a defence to be conducted in person "or" with legal assistance of one's own choosing, taking as its point of departure the right to conduct one's own defence. In fact, if an accused person had to accept an unwanted counsel whom he does not trust he may no longer be able to defend himself effectively as such counsel would not be his assistant. Thus, the right to conduct one's own defence, which is a cornerstone of justice, may be undermined when a lawyer is imposed against the wishes of the accused.

7.4 The right to defend oneself without a lawyer is not absolute, however. Notwithstanding the importance of the relationship of trust between accused and lawyer, the interests of justice may require the assignment of a lawyer against the wishes of the accused, particularly in cases of a person substantially and persistently obstructing the proper conduct of trial, or facing a grave charge but being unable to act in his own interests, or where it is necessary to protect vulnerable witnesses from further distress if the accused were to question them himself. However, any restriction of the accused's wish to defend himself must have an objective and sufficiently serious purpose and not go beyond what is necessary to uphold the interests of justice.

7.5 The Committee considers that it is the task of the competent courts to assess whether in a specific case the assignment of a lawyer is necessary in the interests of justice, inasmuch as a person facing criminal prosecution may not be in a position to make a proper assessment of the interests at stake, and thus defend himself as effectively as possible. However, in the present case, the legislation of the State party and the case law of its Supreme Court provide that the accused can never be freed from the duty to be represented by counsel in criminal proceedings, even if he is a lawyer himself, and that the law takes no account of the seriousness of the charges or the behaviour of the accused. Moreover, the State party has not provided any objective and sufficiently serious reasons to explain why, in this instance of a relatively simple case, the absence of a court-appointed lawyer would have jeopardized the interests of justice or why the author's right to self-representation had to be restricted. The Committee concludes that the right to defend oneself in person, guaranteed under article 14, paragraph 3 (d), of the Covenant has not been respected.

8. The Committee recalls that by acceding to the Optional Protocol, the State party has recognized the Committee's competence to determine whether there has been a violation of the Covenant or not and that, pursuant to article 2 of the Covenant, it has undertaken to respect and ensure to all individuals within its territory or subject to its jurisdiction the rights recognized in the Covenant, and to take the necessary steps and provide an effective and enforceable remedy in cases where a violation has been established. The Committee considers that the author is entitled to an effective remedy under article 2, paragraph 3 (a), of the Covenant. The State party should amend its laws to ensure their conformity with article 14, paragraph 3 (d), of the Covenant. Consequently, within 90 days of communicating these views, the Committee would like to receive from the State party information on the measures taken to give effect to them. The State party is also requested to make the Committee's views public.

[Adopted in English, French and Spanish, the French text being the original version. Subsequently to be issued in Arabic, Chinese and Russian as part of the Committee's annual report to the General Assembly.]

Notes

[1] *Carlos Correia de Matos v. Portugal (*dec.), No. 48188/99, 14 September 2000.

[2] *Carlos Correia de Matos v. Portugal (*dec.), No. 48188/99, CEDH 2001-XII.

[3] The State party refers to Ireneu Cabral Barreto in its comments to the European Court of Human Rights (2nd ed., pp. 168-169) and to the case of *Croissant v. Germany*, 25 September 1992 (Series A, No. 237-B).

[4] For example, China, Sweden and Switzerland.

APPENDIX

Dissenting opinion by Committee members Ms. Elizabeth Palm, Mr. Nisuke Ando and Mr. Michael O'Flaherty

We disagree with the majority's decision for the following reasons.

As the Committee's majority has noted, the right to defend oneself without a lawyer is not absolute. Even if the relationship of trust between the accused and lawyer is important, the interests of justice may require the assignment of a lawyer against the wishes of the accused. We observe that it is not for the Committee to decide on the State party's legislation in the abstract but to examine if there in the case before it is a violation of the author's right under the Covenant. We consider that national courts are better placed than an international committee to assess whether in a specific case the assignment of a lawyer is necessary in the interests of justice. We find that there is nothing in the material before the Committee that indicates that the relevant courts' decisions were arbitrary or that the author was unable to present his own view of the facts to the courts concerned. We therefore find that the State party has not infringed the author's right to defense and that consequently there has been no violation of the Covenant. Furthermore we note that the European Court of Human Rights has, in the decision *Correia de Matos v. Portugal*, 15 November 2001, declared inadmissible an application from the same author on the same facts. We are deeply concerned that two international instances - instead of trying to reconcile their jurisprudence with one another - come to different conclusions when applying exactly the same provisions to the same facts.

(*Signed*): Ms. Elizabeth Palm

(*Signed*): Mr. Nisuke Ando

(*Signed*): Mr. Michael O'Flaherty

[Done in English, French and Spanish, the English text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the Committee's annual report to the General Assembly.]

Dissenting opinion by Committee member Sir Nigel Rodley

While inclined to agree with the dissent of Mr. Ando and Ms Palm on the merits, not least because of the cavalier way in which the Committee chooses to ignore the reasoned approach of the European Court of Human Rights, applying the same law to the same facts, I do not believe that the Committee needed even to reach a decision on the merits.

Important as it may be to ensuring justice in an individual case, a constitutional motion is not procedurally an integral part of a criminal trial. The Covenant does not guarantee a right to engage in any legal procedure without legal counsel. Accordingly, the author's failure to instruct legal counsel to pursue the motion (the Committee is not in a position to determine whether the author was improperly removed from the Bar Council's roll, nor does it) meant that a possible domestic remedy was not exhausted. Accordingly, the Committee should have declared the case inadmissible under article 5, paragraph 2 (b), of the Optional Protocol.

(*Signed*): Sir Nigel Rodley

[Done in English, French and Spanish, the English text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the Committee's annual report to the General Assembly.]

X. Communication No. 1125/2002, *Quispe v. Peru* (Views adopted on 21 October 2005, eighty-fifth session)*

Submitted by:	Jorge Luis Quispe Roque (not represented by counsel)
Alleged victim:	The author
State party:	Peru
Date of communication:	17 July 2002 (initial submission)
Subject matter:	Trial and conviction of a person under anti-terrorist legislation
Procedural issues:	Possible failure to exhaust domestic remedies following the annulment of the conviction and pending a new trial
Substantive issues:	Violation of the right to liberty and security of person and the guarantees of due process
Articles of the Covenant:	9 and 14
Articles of the Optional Protocol:	5, paragraph 2 (b)

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 21 October 2005,

Having concluded its consideration of communication No. 1125/2002, submitted by Mr. Jorge Luis Quispe Roque under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the author of the communication and the State party,

Adopts the following:

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* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Prafullachandra Natwarlal Bhagwati, Ms. Christine Chanet, Mr. Maurice Glèlè Ahanhanzo, Mr. Edwin Johnson, Mr. Walter Kälin, Mr. Ahmed Tawfik Khalil, Mr. Rajsoomer Lallah, Mr. Michael O'Flaherty, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Ivan Shearer, Mr. Hipólito Solari-Yrigoyen and Mr. Roman Wieruszewski.

Views under article 5, paragraph 4, of the Optional Protocol

1.1 The author of the communication, dated 17 July 2002, is Mr. Jorge Luis Quispe Roque, a Peruvian citizen born in 1962, currently being held in the Miguel Castro Castro special closed prison in Lima. He claims to be the victim of violations by Peru of articles 9 and 14 of the Covenant. He is not represented by counsel.

1.2 The Optional Protocol entered into force for the State party on 3 January 1981.

The facts as submitted by the author

2.1 The author was a member of the cleaning staff at the César Vallejo preparatory academy in Lima. On 20 June 1992, at 10 p.m., the author was in his vehicle with his wife and younger son, in front of his in-laws' home in Lima, when he was intercepted by a group of armed police officers who forced him to get into another vehicle; the officers fired shots into the air and beat and shoved the author. They drove the author to his place of work. When they arrived, they forced him to enter one of the offices, where they covered his face with his jacket, sat him down and tied him up. While the author remained seated, the officers conducted a search of the offices.

2.2 The police asserted that "subversive leaflets and explosives" were found during the search. The author maintains that this allegation is false and that the materials that were supposedly found do not exist.

2.3 On 21 June 1992, the author's wife submitted a complaint to the office of provincial prosecutor No. 4 in Lima against the National Police - National Counter-Terrorism Directorate (DINCOTE) - concerning the author's kidnapping, supplying the licence plate numbers of the two vehicles allegedly used in the kidnapping, and of the author's vehicle which, the author alleges, was seized by the officers.

2.4 On 24 June 1992, the author's home was searched but no subversive material was found.

2.5 The author was sentenced to 20 years' imprisonment for an "offence against the public peace - terrorism - [offences] against public and private entities - the State -", by the Special Criminal Counter-Terrorism Division of the High Court of Lima (a "faceless" court) in the collective sentencing of 30 November 1994.

2.6 The author filed a petition of annulment with Special Division of the Supreme Court. On 5 September 1996, the Division rejected the petition and upheld the author's conviction, although it acknowledged that article 285 of the Code of Criminal Procedure had been incorrectly applied, since ordinary public and private entities had been considered as aggrieved parties when in such proceedings the aggrieved party should be the State.

2.7 The author filed a petition for the constitutional guarantee of habeas corpus with the Constitutional Court, alleging irregularities in the trial; in its ruling of 22 June 1999, the Constitutional Court declared the petition inadmissible.

2.8 The author declares that he has not applied to any other international body with regard to the subject matter of the communication.

The complaint

3.1 The author claims to be a victim of a violation of article 9, since he was arbitrarily arrested without being informed of the reasons for his arrest or of any charges against him.

3.2 The author maintains that the sentencing court was composed of faceless judges, that his right to be heard publicly was denied, that the ruling was based exclusively on police testimony and that he was sentenced mainly for his alleged ties with the principal defendant, although the nature of those ties was not specified. Moreover, his lawyer was given only a short time - 30 minutes - to examine the case file, which contained more than 2,000 sheets, and had no opportunity to question witnesses. All of the foregoing constitutes a violation of article 14 of the Covenant.

The State party's observations on admissibility

4.1 In its observations of 7 March 2005, the State party reports that in January 2003 the Constitutional Court declared unconstitutional various procedural and criminal rules for combating terrorism. As a result, the Government issued Legislative Decree No. 926 in February 2003 standardizing the annulment of proceedings for the offence of terrorism conducted before judges and prosecutors whose identity was concealed and where the prohibition of objection applied. It also issued Legislative Decree No. 922, according to which criminal proceedings for the offence of terrorism are to be conducted in accordance with the ordinary procedural arrangements under the Code of Criminal Procedure.

4.2 The author's case has been pending in the National Terrorism Division since 2 September 2004 in the context of a new criminal proceedings case instituted in accordance with the new anti-terrorist legislation. The State party therefore considers that the communication should be declared inadmissible, since domestic remedies have not been exhausted.

The author's comments

5.1 The author points out that the State party's comments were not submitted within the six-month time limit established by rule 97, paragraph 2, of the Committee's rules of procedure. Consequently, the State party has not complied with the provisions of article 4, paragraph 2, of the Optional Protocol.

5.2 The author notes that, while the Constitutional Court urged the Congress of Peru to replace, within a reasonable period of time, the relevant anti-terrorist legislation, Congress abdicated its responsibility and, in Authoritative Act No. 27913 of 8 January 2003, delegated its legislative powers to adopt anti-terrorist measures to the executive branch. The author alleges that Legislative Decrees Nos. 921 to 927, which were adopted as a result of this mandate, have not substantially changed the legislative framework, since the existing unconstitutional legislation has not been replaced but has been supplemented in some cases and amended in others. Thus, not all of the previous anti-terrorist legislation has been repealed. Specifically, article 2 of Decree Law No. 25475 retains the basic definition of the offence of terrorism. Moreover, the Decree Law provides for the establishment of a commission composed of representatives of the three branches of Government, by representatives of the Public Prosecutor's Office, the armed forces and the police to monitor its implementation; such a commission is unconstitutional because it violates the principle of separation of powers. On the basis of all of the foregoing, the author states that 5,186 citizens, including himself, filed an action of unconstitutionality (registered under No. 003-2005-PI/TC) with the Constitutional Court against the ruling of January 2003, referred to in the observations by the State party; the action is currently pending.

5.3 The author maintains that new Decree Law No. 926 is unconstitutional and contrary to article 9, paragraph 3, of the Covenant, since it provides for the ex officio annulment of proceedings conducted by faceless courts but does not alter the legal situation of the defendants; that is, it continues to deprive them of their liberty, as in the case of the author, who has been serving his sentence for the past 13 years. The author cites the case of *Cruz Flores v. Peru*, in which the Inter-American Commission on Human Rights considered that the fact that the new legislation did not take account of the time spent in deprivation of liberty as a result of the previous trial constituted arbitrary detention.

5.4 The author maintains that Legislative Decree No. 922 is also unconstitutional and contrary to article 14, paragraph 1, of the Covenant, since it establishes a special court, the National Terrorism Division, for cases of terrorism, and not courts of ordinary jurisdiction.

5.5 The author reiterates that he has exhausted all available domestic remedies, having filed a special remedy with the Constitutional Court.

Issues and proceedings before the Committee

Consideration of admissibility

6.1 Before considering any claim contained in a communication, the Human Rights Committee must, in accordance with rule 93 of its rules of procedure, decide whether or not the communication is admissible under the Optional Protocol to the International Covenant on Civil and Political Rights.

6.2 The Committee has ascertained that the same matter is not being examined under another procedure of international investigation or settlement, in compliance with the provisions of article 5, paragraph 2 (a), of the Optional Protocol.

6.3 With regard to the requirement of the exhaustion of domestic remedies, the Committee takes note of the State party's assertion that the case is pending in the National Terrorism Division in the context of new criminal proceedings instituted in accordance with the new anti-terrorist legislation and that, consequently, domestic remedies have not been exhausted. However, the Committee notes that the author was arrested on 20 June 1992 and subsequently tried and sentenced under Decree Law 25475 of 5 May 1992, and that he filed all the appeals permitted under that legislation against his sentence. All of this took place prior to the date on which the author submitted his communication to the Committee. The fact that the legislation that applied to the author and on which his communication was based was declared null and void several years later cannot be considered to his disadvantage. In the circumstances, it cannot be claimed that the author should wait for the Peruvian courts to take a new decision before the Committee can consider the case under the Optional Protocol, particularly when the author has been deprived of liberty for 13 years.

6.4 The Committee accordingly declares the communication admissible with regard to the alleged violations of articles 9 and 14 of the Covenant and proceeds to consider the merits of the complaint under article 5, paragraph 1, of the Optional Protocol, bearing in mind the information provided by the parties.

Consideration of the merits

7.1 The Committee regrets that the State party has not submitted observations on the merits of the case under consideration. In this regard, it recalls that it may be inferred from article 4, paragraph 2, of the Optional Protocol that the State party must examine in good faith all the charges against it and provide the Committee with all the information at its disposal. Since the State party has not cooperated with the Committee in the matters raised, the author's claims must be given their due importance insofar as they are substantiated.

7.2 With regard to the author's contentions concerning a violation of article 9, since he was arrested without being informed of the reasons for his arrest, the Committee considers that, as the State party has not replied to these allegations, due weight must be given to them and it must be taken that the events occurred as the author described them. The Committee thus considers that there has been a violation of article 9 of the Covenant.

7.3 With regard to the author's complaints in relation to article 14, the Committee takes note of his allegations that his trial was conducted by a court composed of faceless judges, that the interrogation of witnesses was not permitted and that his lawyer had only 30 minutes to examine the case file. In the circumstances, the Committee, recalling all of its previous jurisprudence in similar cases, concludes that article 14 of the Covenant as a whole was violated.

8. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts before it disclose a violation of articles 9 and 14 of the Covenant.

9. In accordance with article 2, paragraph 3 (a), of the Covenant, the State party is required to furnish the author with an effective remedy and appropriate compensation. In the light of the long period that he has already spent in prison and the nature of the acts of which he is accused, the State party should consider the possibility of terminating his deprivation of liberty, pending the outcome of the current proceedings against him. Such proceedings must comply with all the guarantees required by the Covenant.

10. Bearing in mind that, as a party to the Optional Protocol, the State party recognizes the competence of the Committee to determine whether there has been a violation of the Covenant, and that, under article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the Covenant and to offer an effective and enforceable remedy when a violation is found to have occurred, the Committee wishes to receive from the State party, within 90 days, information about the measures taken to give effect to the present Views. The State party is also requested to publish the Committee's Views.

[Adopted in English, French and Spanish, the Spanish text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the Committee's annual report to the General Assembly.]

Y. Communication No. 1126/2002, *Carranza v. Peru*
(Views adopted on 28 October 2005, eighty-fifth session)*

Submitted by:	Marlem Carranza Alegre (represented by counsel, Carolina Loayza Tamayo)
Alleged victim:	The author
State party:	Peru
Date of communication:	12 March 2002 (initial submission)
Subject matter:	Trial and conviction of an individual under anti-terrorist legislation
Procedural issues:	Possible failure to exhaust domestic remedies following the annulment of the conviction and initiation of new proceedings
Substantive issues:	Violation of the right to liberty and security of person and the guarantees of due process
Articles of the Covenant:	2, 7, 9, 10, 14 and 15
Articles of the Optional Protocol:	2, 5, paragraph 2 (b)

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 28 October 2005,

Having concluded its consideration of communication No. 1126/2002, submitted on behalf of Ms. Marlem Carranza Alegre under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the author of the communication and the State party,

Adopts the following:

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* The following members of the Committee participated in the examination of the present communication: Mr. Prafullachandra Natwarlal Bhagwati, Mr. Alfredo Castillero Hoyos, Ms. Christine Chanet, Mr. Maurice Glèlè Ahanhanzo, Mr. Walter Kälin, Mr. Ahmed Tawfik Khalil, Mr. Rajsoomer Lallah, Mr. Michael O'Flaherty, Ms. Elisabeth Palm, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Ivan Shearer, Mr. Hipólito Solari-Yrigoyen, Ms. Ruth Wedgwood and Mr. Roman Wieruszewski.

Views under article 5, paragraph 4, of the Optional Protocol

1.1 The author of the communication is Ms. Marlem Carranza Alegre, a Peruvian citizen, currently imprisoned in the Chorrillos Women's Maximum Security Prison, Lima. She claims to be the victim of violations by Peru of articles 2, 7, 9, 10, 14 and 15 of the International Covenant on Civil and Political Rights. She is represented by counsel, Carolina Loayza Tamayo.

1.2 The Optional Protocol entered into force for Peru on 3 January 1981.

Factual background

2.1 The author worked as a doctor in Casimiro Ulloa Emergency Hospital, Lima. On 16 February 1993 she was stopped in the street by individuals in civilian clothes who forced her into a vehicle for an unknown destination. Once in the vehicle the individuals identified themselves as members of the police and informed her that she was being detained in connection with the investigation of terrorist incidents. They handcuffed her and covered her head with her jacket. The author was then taken to premises which she later learned were those of the Department of Counter-Terrorism (DINCOTE).

2.2 The author was interrogated blindfolded. During interrogation she was threatened with the arrest of her family members and with the confiscation of her possessions and medical equipment; she was accused of treating terrorists and was hit on the head and lost consciousness. When she recovered her senses, the interrogation continued with blows, insults and threats, including the threat of rape. During the first days of her detention she was forced to remain standing for the entire day.

2.3 The police searched her home and claimed to have found a document establishing a link between her and the Sendero Luminoso terrorist organization. The author asserts that this document did not belong to her. She was accused of having treated "subversives" and coerced medical colleagues into doing the same. She was also urged under threat to denounce other persons who had allegedly "forced her" to perform those acts.

2.4 The author remained in solitary confinement for seven days, following which the police report was prepared. It concluded that the author was guilty of the offence of terrorism. On 24 February 1993 Lima's provincial criminal prosecutor No. 14 drew up a charge against the author, accusing her of being a member of "the subversive organization the Sendero Luminoso Communist Party of Peru, in the health section of the People's Aid Association, as an activist, trainer, organizer of support and contact". She was remanded in custody. On the same date the judge initiated pretrial proceedings and ordered her to be detained.

2.5 The author was tried for an offence against the public peace/terrorism by the Special Criminal Division for terrorist affairs of the High Court of Lima (a "faceless" or concealed identity division), under Decree Law No. 25475 of 5 May 1992, which established this offence. On 2 March 1994 the Division handed down a judgement sentencing the author to 20 years' imprisonment. The sentence was appealed and declared void by the Supreme Court on 8 June 1995, on the grounds that there had been irregularities in the proceedings in breach of the Code of Criminal Procedure.

2.6 On 16 October 1995 a new oral hearing took place before the Special (faceless) Criminal Division of the High Court of Lima, accusing the author of "being a member of the so-called health section of the department of support of the Peruvian People's Aid Association, one of the central bodies of the self-styled terrorist group, the Sendero Luminoso Communist Party of Peru". More specifically, she was accused of being a member of the leadership cell of the health section, of being in charge of it and of drawing up plans for the care and examination of persons wounded in terrorist actions in metropolitan Lima. She was sentenced to 25 years' imprisonment and a fine for the offence of terrorism under articles 4 (terrorism - acts of collaboration), 5 (membership of a terrorist organization) and 6 (incitement to commit acts of terrorism) of Decree Law No. 25475. The author claims that these definitions of offences do not apply.

2.7 On 3 September 1997 the author filed a petition for annulment with the Supreme Court, contending that the conviction was based on legislation - Decree Law No. 25475 of 5 May 1992 - which had not been in force when the acts with which she was charged allegedly took place, that is, between 1987 and the early months of 1992. At that time, the legislation applicable was the Criminal Code and Act No. 24953, which punished offences against the public peace/terrorism with maximum sentences of 15 and 25 years respectively for the alleged offence of association. In addition, pretrial investigations were initiated against her for allegedly being an accessory to the offence of terrorism but she was convicted on a different charge, namely, that of being a "middle level cadre" of Sendero Luminoso. On 29 September 1997 the Court rejected the petition. Neither the author nor her counsel were notified of the judgement.

2.8 In October 1997, the author's father sought a pardon from the President of the Republic under Act No. 26655. Under this Act an ad hoc commission had been set up to propose that the President should grant a pardon to persons sentenced for the offence of terrorism contrary to fundamental standards of justice.

2.9 During the first few years of her detention in Chorrillos Maximum Security Prison, even before being convicted, the author was held in a cell 2.5 metres square, shared with five or six persons simultaneously, where she remained all day except for half an hour in the yard. During her periods in the yard she could not talk to other inmates. She did not have access to reading and writing materials. Her visiting rights were restricted to two immediate relatives per month for a total of 30 minutes in multi-person visiting rooms and without physical contact. The food was inadequate. As a result of all of this she had health problems and began to suffer from bruxism, facial paralysis, dermatitis, aggravated myopia, bronchial symptoms, etc.

2.10 The author maintains that she was subjected to the regime under Decree Law No. 25475, in accordance with which:

> The determination of the unlawful act was made by officers of the DINCOTE police, and used as a basis to determine the competent court;
>
> The appointment of defence counsel was regularly made after the police investigation had taken place;
>
> Counsel freely elected by the defendant could not have an interview with the defendant before the latter made a statement to the examining magistrate;

Neither defendants nor their counsel were shown the evidence against them. Nor was the defence permitted to challenge witnesses who had made statements during the police investigation;

Defendants had no access to any right of conditional release before the conclusion of proceedings;

A special ad hoc procedure was established and applied by a judge during the investigation phase and by faceless judges during the oral hearing, whereby procedural guarantees were not admitted;

Charge and evidence statements, records of hearings and judgements lacked the signature of the prosecutors and judges involved because of their faceless status;

During the first year of imprisonment, a regime of continuous solitary confinement was imposed on the accused, in addition to other restrictions.

2.11 The author declares that she has not made application to any other international body with regard to the subject matter of the communication.

The complaint

3.1 The author claims that the facts described are a violation of several provisions of the Covenant.

3.2 As the author asserted in her testimony before the Criminal Court on 10 March 1993, she was subjected to physical and mental torture during her detention by DINCOTE; she was also left without food and kept in solitary confinement for seven days. All the interrogations were accompanied by blows to the head, insults, threats and psychological pressure. The solitary confinement was permitted under article 12 (d) of Decree Law No. 25475 and was absolute, even counsel being excluded. This constitutes a form of cruel and inhuman treatment damaging to an individual's physical, mental and moral well-being. According to the author, these facts are a violation of article 7 of the Covenant.

3.3 Article 9, paragraph 1, was also violated, since the author was detained arbitrarily, without a court order and without having been caught in flagrante delicto, these being requirements of article 2.24 (f) of the Constitution of Peru. Moreover, the legislation applied to her did not permit the judge to order the appearance of the detainee. Contrary to article 9, paragraph 3, of the Covenant, detention in custody was the general rule, with no exceptions. Furthermore, article 6 of Decree Law No. 25659, which restricted the possibility of filing a remedy of habeas corpus in respect of persons under investigation for the offence of terrorism, was applied to her. This was a violation of article 9, paragraph 4, of the Covenant.

3.4 According to the author, the regime of deprivation of liberty applied to her on the basis of Decree Law No. 25475 was inhumane and thus a violation of article 10 of the Covenant. It excluded, inter alia, the possibility of taking advantage of the benefits set out in the

Criminal Code and the Code of Criminal Enforcement. It furthermore provided that it was mandatory for the sentence to be served in a maximum security prison with continuous solitary confinement during the first year of detention and imposed severe restrictions on the system of visits.

3.5 The author further asserts that article 14, paragraph 1, was violated since she was tried by faceless courts, where the identity of the judges is kept secret and objection is impossible. The Decree Law also lays down that both pretrial proceedings for the offence of terrorism and the oral hearing must be conducted in specially designed premises within the criminal courts. According to the author, the secret nature of the oral hearing distorts it since its public nature is its fundamental characteristic and a guarantee of fairness.

3.6 Article 14, paragraph 2, was also violated, since Decree Law No. 25475 eliminated the independence of the judge and of the Public Prosecutor's Office.[1] The judge was unable to take a decision on the basis of the evidence submitted as to whether or not there were grounds for initiating the pretrial investigation: rather, the Decree "orders" the judge to initiate the investigation and issue an arrest warrant. Detention is compulsory; the judge no longer has the discretion to order a conditional release. With regard to the Public Prosecutor's Office, the Decree requires the senior prosecutor to issue a charge and evidence statement when the pretrial investigation is concluded, with the consequent disappearance of any discretion in proceeding. Overall, this represents a violation of the right to be presumed innocent.

3.7 According to the author, there was a violation of article 14, paragraph 3, since as the police report attests, the author was not clearly notified in detail of the reason for her detention. She was furthermore unable to communicate with her counsel during the time she remained in solitary confinement, since article 12 (f) of the Decree Law established that the defence lawyer could only intervene as from when the detainee made his statement before the Public Prosecutor. Article 13 of the Decree Law also eliminated a fundamental defence mechanism by preventing individuals involved in the investigation from being called to testify as witnesses before a judge or court. The author's conviction was based exclusively on the police report, which means that the Public Prosecutor's Office did not prove the accusations; instead, the burden of proof was on the author.

3.8 The facts on which the detention and subsequent trial and sentencing of the author were based supposedly took place between 1987 and the early months of 1992. The complaint by the Public Prosecutor's Office, the initiation of proceedings and the subsequent sentence were, however, based on Decree Law No. 25475, promulgated on 5 May 1992, which imposed heavier penalties. This is a violation of article 15 of the Covenant.

3.9 Article 15 was also violated by the fact that the author was sentenced for acts and offences other than those for which the criminal investigation was initiated. The Fourteenth Specialized Criminal Court of Lima opened an investigation for an alleged offence against the public peace/terrorism, as "collaboration", under article 4 (b) of the Decree Law. As set out in the order to commence investigation, the alleged acts of collaboration consisted of surgical operations and the provision of surgical instruments, medical equipment, medicine, X-rays and clinical analyses to the "terrorist" group. She was, however, sentenced for being a "middle level cadre" of Sendero Luminoso. The medical acts described were further criminalized as collaboration, although none of them is described as collaboration in article 321 of the Criminal Code, one of the applicable standards in force.

3.10 Lastly, the author maintains that any violation of any of the rights enshrined in the Covenant entails the violation of the State's obligation to respect those rights, embodied in article 2, paragraph 1.

The State party's observations on admissibility

4.1 In its observations of 22 December 2004[2] the State party reports that in January 2003 the Constitutional Court handed down a judgement in which it declared various procedural and criminal rules in anti-terrorist matters to be unconstitutional. As a result, the Government issued Legislative Decree No. 926 in February 2003 standardizing the annulment of proceedings for the offence of terrorism conducted before judges and prosecutors whose identity was concealed and where the prohibition of objection applied. It also issued Legislative Decree No. 922, according to which criminal proceedings for the offence of terrorism are to be conducted in accordance with the ordinary procedural arrangements of the Code of Criminal Procedure.

4.2 On 15 January 2003, the High Court of Lima issued a decision concerning the remedy of habeas corpus filed by the author against the Special Criminal Division of the High Court of Lima and the Supreme Court for violation of her personal liberty as a result of a breach of due process. The remedy was declared admissible and the criminal trial of the author consequently void since the fundamental principles of due process - a competent and established judge and the right to know whether the trial judge had jurisdiction - had been violated and since she had been sentenced by faceless judges. On 3 February 2003 the National Terrorism Division issued a writ ordering this decision to be implemented.

4.3 On 27 March 2003, the First Special Court for terrorist offences instituted pretrial proceedings against the author for the offence of ordinary terrorism as provided in article 288-A and article 288-B, paragraph (a), of the 1924 Criminal Code, introduced by Act No. 24651; articles 319 and 320, paragraph 1, of the 1991 Criminal Code; and articles 2 and 5 of Decree Law No. 25475, and issued a detention order. The proceedings were assigned to the National Terrorism Division and referred to the Office of the Second Senior Prosecutor specializing in terrorist offences. In a decision of 6 September 2004 the Prosecutor entered a charge of terrorism. The author was charged with belonging to a subversive organization, the Sendero Luminoso Communist Party of Peru, and with being a member of the cell management committee of the health section of the department of support of the People's Aid Association and therefore in charge of groups belonging to the organization. As a surgeon, she was responsible for recruiting doctors, organizing them and providing support activities consonant with the medical profession. The prosecutor requested a 30-year prison sentence, a fine and an accessory penalty of loss of civil rights.

4.4 The author's case is pending in the National Terrorism Division in the context of new criminal proceedings instituted in accordance with the new anti-terrorist legislation. The State party therefore considers that domestic remedies have not been exhausted and that the communication should be declared inadmissible.

The author's comments

5.1 The author states that she is being tried for the second time for the same acts, as a result of her quest for justice. A new trial, however, is not adequate reparation in cases of the violation of due process, particularly when this is owing to an act on the part of the State challenged.

5.2 This communication was submitted to the Committee when the author was serving a sentence resulting from a criminal trial against her in total violation of due process; this situation has been acknowledged by the Peruvian judiciary, which pronounced admissible the remedy of habeas corpus filed on her behalf in a decision in first instance on 2 December 2002 and in second instance on 15 January 2003. Furthermore, Legislative Decree No. 926, which provides for the annulment of trials by ordinary courts for the offence of terrorism, is accompanied by express State acknowledgement of the violation of due process and judicial guarantees, and hence of the right to liberty of persons detained, tried and sentenced for the offence of terrorism.

5.3 The lack of precision in the definition of the offence of terrorism in article 2 of Decree Law No. 25475 is incompatible with the principle of legality enshrined in the Covenant, since the acts comprising the offence were described in the abstract and imprecisely, so that it is impossible to know exactly what specific behaviour constitutes this criminal offence.

5.4 The author asserts that she was accused of having treated and supplied medicines to "terrorists" and their family members. Not only are these two acts not illegal, they are lawful and ethically correct. The acts of participation in a surgical operation, treatment and provision of medicines do not form part of the crime of terrorism. A state of anxiety or terror is neither provoked, created nor maintained, deliberately or involuntarily, by medical acts, nor can they be assimilated to acts injurious to life, physical integrity, health or individual freedom and safety or to State or private property, nor do they constitute an attack on public or private safety.

5.5 In accordance with the estoppel principle enshrined in international law, the State is precluded from invoking its own acts. Consequently, it cannot contend that the author did not exhaust domestic remedies. In a recent judgement of 18 November 2004 handed down in the case of De la Cruz Flores, the Inter-American Court of Human Rights stated that a new trial was not sufficient to make reparation for violations of due process.

5.6 The author says that she has been detained for approximately 12 years, accused but not sentenced, in violation of article 9 of the Covenant. In July 2002, she applied to be granted semi-liberty, but this was declared inadmissible, initially by the Twenty-eighth Provincial Criminal Court of Lima and subsequently by the High Court, on the grounds that the period of detention under the Code of Criminal Procedure had not been completed, in that it ran as from the date of the order to commence investigation, i.e. 21 March 2003. The State party thus ignored the period spent by the author in prison due to its failure to ensure her fair trial. In other words, the State invokes its own acts in order to deny the author her right to trial within a reasonable time or to release, as article 9, paragraph 3, of the Covenant requires.

Issues and proceedings before the Committee

Consideration of admissibility

6.1 Before considering any claim contained in a communication, the Human Rights Committee must, in accordance with rule 93 of its rules of procedure, decide whether or not the communication is admissible under the Optional Protocol to the Covenant.

6.2 The Committee has ascertained that the same matter is not being examined under another procedure of international investigation or settlement, in compliance with the provisions of article 5, paragraph 2 (a), of the Optional Protocol.

6.3 With regard to the requirement of the exhaustion of domestic remedies, the Committee takes note of the State party's assertion that the case is pending in the National Terrorism Division in the context of new criminal proceedings instituted in accordance with the new anti-terrorist legislation, and that, consequently, domestic remedies have not been exhausted. The Committee is pleased to observe the amendment of several procedural and penal rules of anti-terrorist legislation, particularly those that permit the annulment of proceedings for the offence of terrorism conducted before judges and prosecutors whose identity has been concealed and establish that criminal proceedings for the offence of terrorism will be conducted in accordance with the ordinary procedures for which the Code of Criminal Procedure provides. With reference, however, to article 5, paragraph 2 (b), of the Optional Protocol, the Committee observes that the author was arrested on 16 February 1993 and subsequently tried and sentenced under Decree Law No. 25475 of 5 May 1992, and that she filed all the appeals permitted under that legislation against her sentence, including a petition for annulment to the Supreme Court. All of this was prior to her submitting her communication to the Committee. The fact that the legislation applied to the author and on which her communication was based was declared null and void several years later cannot be considered to her disadvantage. In the circumstances, it cannot be claimed that the author should wait for the Peruvian courts to take a new decision before the Committee can consider the case under the Optional Protocol. Further, the Committee observes that the application of remedies before the Peruvian courts was initiated in 1993 and has still not been concluded.

6.4 The author contends that she received a harsher sentence than was appropriate under the legislation applicable at the time the alleged acts were committed, thus constituting a violation of article 15 of the Covenant. The Committee considers, however, that the author has not furnished sufficient evidence for it to take a decision with regard to this contention, and therefore considers that this part of the communication should be considered inadmissible, under article 2 of the Optional Protocol, for lack of substantiation.

6.5 The Committee accordingly declares the communication admissible with regard to the alleged violations of articles 7, 9, 10 and 14 of the Covenant and proceeds to consider the merits of the complaint under article 5, paragraph 1, of the Optional Protocol, bearing in mind the information provided by the parties.

Consideration of the merits

7.1 The Committee regrets that the State party has not submitted observations on the merits of the case under consideration. It recalls that it may be inferred from article 4, paragraph 2, of the Optional Protocol that the State party must examine in good faith all the complaints made against it and provide the Committee with all the information at its disposal. Since the State party has not cooperated with the Committee in the matters raised, the author's claims must be given their due weight insofar as they are substantiated.

7.2 The author asserts that during the days she was held by DINCOTE she was subjected to torture, of which she provides details. As the State party provides no information to contradict these allegations, due weight must be given to them and it must be taken that the events occurred as described by the author. The Committee thus considers that there has been a violation of article 7 of the Covenant.

7.3 With regard to the author's contentions concerning the violation of her right to liberty and security of person, the Committee considers that her arrest and detention incommunicado for seven days and the restrictions on the exercise of the right of habeas corpus constitute violations of article 9 of the Covenant as a whole.

7.4 The author contends that the regime of deprivation of liberty applied to her under Decree Law No. 25475 constitutes a violation of article 10 of the Covenant. The Committee considers that the conditions of detention in the Chorrillos Women's Maximum Security Prison described by the author, particularly those applied during her first year of detention, violated her right to be treated with humanity and with respect for the inherent dignity of her person and therefore breached the provisions of article 10 as a whole.

7.5 With regard to the author's complaints in relation to article 14, the Committee takes note of her allegations that the hearings at her trial were held in private and that the court comprised faceless judges who could not be challenged; that she was unable to communicate with her lawyer during the seven days she was held incommunicado; that the police officers involved in the investigation were not called as witnesses since this was not permitted under Decree Law No. 25475; and that her lawyer was not able to challenge witnesses who had made statements during the police investigation. In the circumstances, the Committee concludes that article 14 of the Covenant, which refers to the right to a fair trial, was breached as a whole.

8. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts before it disclose a violation of articles 7, 9, 10 and 14, together with article 2, paragraph 1, of the Covenant.

9. In accordance with article 2, paragraph 3 (a), of the Covenant, the State party is required to furnish the author with an effective remedy and appropriate compensation. In the light of the long period she has already spent in detention and the nature of the acts of which she stands accused, the State party should give serious consideration to terminating her deprivation of liberty, pending the outcome of the current proceedings. Such proceedings must comply with all the guarantees required by the Covenant.

10. Bearing in mind that, as a party to the Optional Protocol, the State party recognizes the competence of the Committee to determine whether there has been a violation of the Covenant, and that, under article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the Covenant and to offer an effective and enforceable remedy when a violation is found to have occurred, the Committee wishes to receive from the State party, within 90 days, information about the measures taken to give effect to the present Views. The State party is also requested to publish the Committee's Views.

[Adopted in English, French and Spanish, the Spanish text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the Committee's annual report to the General Assembly.]

Notes

[1] Article 13: "For the investigation and trial of the terrorist offences referred to in this Decree Law the following rules shall be observed: (a) Once the charge has been formalized by the Public Prosecutor's Office, the detainees shall be brought before the criminal judge, who shall give the order to commence investigation with an arrest warrant within a period of 24 hours, after the necessary security measures have been taken. During the investigation no form of release may be envisaged; there shall be no exceptions. (…) (d) On conclusion of the investigation, the file shall be transmitted to the President of the court in question, who shall transmit the proceedings to the chief prosecutor, who in turn shall appoint the senior prosecutor who must draw up the indictment within three days, being liable for failure to do so."

[2] The communication was transmitted to the State party on 14 October 2002. The State party had six months, i.e. until 14 April 2003, to give its reply on admissibility and merits. When no reply was received, reminders were sent on 15 September and 18 November 2004.

Z. Communication No. 1132/2002, *Chisanga v. Zambia* (Views adopted on 18 October 2005, eighty-fifth session)*

Submitted by:	Mr. Webby Chisanga (not represented by counsel)
Alleged victim:	The author
State party:	Zambia
Date of communication:	15 October 2002 (initial submission)
Subject matter:	Death row phenomenon, notion of "most serious crimes", mandatory nature of the death penalty
Procedural issues:	Request for interim measures of protection
Substantive issues:	Cruel and inhuman treatment, right to life, right to appeal and effective remedy, right to seek pardon or commutation
Articles of the Covenant:	14, paragraph 5 together with article 2; 7; 6, paragraph 2 and 6, paragraph 4 together with article 2
Articles of the Optional Protocol:	2

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 18 October 2005,

Having concluded its consideration of communication No. 1132/2002, submitted to the Human Rights Committee by Mr. Webby Chisanga under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the author of the communication, and the State party,

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* The following members of the Committee participated in the examination of the present communication: Mr. Prafullachandra Natwarlal Bhagwati, Ms. Christine Chanet, Mr. Maurice Glèlè Ahanhanzo, Mr. Edwin Johnson, Mr. Walter Kälin, Mr. Ahmed Tawfik Khalil, Mr. Rajsoomer Lallah, Mr. Michael O'Flaherty, Ms. Elisabeth Palm, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Ivan Shearer, Mr. Hipólito Solari-Yrigoyen, Ms. Ruth Wedgwood and Mr. Roman Wieruszewski.

Adopts the following:

Views under article 5, paragraph 4, of the Optional Protocol

1.1 The author of the communication dated 15 October 2002 is Webby Chisanga, a Zambian citizen currently on death row. Although he does not invoke any provisions of the International Covenant on Civil and Political Rights (the Covenant), his claims of human rights violations by Zambia[1] seem to raise issues under articles 14, paragraphs 1, 2, 3 (b), and 5 together with article 2; 7; 6, paragraph 2 and 6, paragraph 4 together with article 2 of the Covenant. He is not represented by counsel.

1.2 On 28 October 2002, the Human Rights Committee, through its Special Rapporteur on new communications, requested the State party, pursuant to rule 92 (old rule 86) of its rules of procedure, not to carry out the death sentence against the author whilst his case was under consideration by the Committee. By letter of 22 March 2004, the State party informed the Committee that it would comply with the request.

Factual background

2.1 In the night of 15 November 1993, a grocery store was robbed by three men, one of whom was armed. The owner of the shop was shot in the thigh and brought to hospital. The author was identified as the armed man by the shop-owner, who knew Mr. Chisanga. He was arrested on 17 November 1993 and identified by the shop-owner during the identification parade. The author denied being one of the robbers and claims to be innocent.

2.2 On 12 May 1995, the author was convicted by the Ndola High Court, for attempted murder (in violation of Section 215 of the Zambian Penal Code), and aggravated robbery (in violation of Section 294 (2) of the Penal Code). He was sentenced to death on the second count, but was not sentenced on the first count, as the trial judge considered that the facts of the case supported the second count. The author appealed his death sentence to the Supreme Court, on the ground of mistaken identity.

2.3 In a submission to the Committee dated 5 December 2002, the author transmitted copy of a "Notification of result of final appeal" of the Master [Registrar] of the Supreme Court dated 4 December 1997, informing him that his case had been heard on the same day by the Supreme Court, which had "set aside the death sentence and imposed a sentence of 18 years with effect from the date of arrest".

2.4 By further submission of 3 November 2003, the author informed the Committee that he had received another notification from the Master of the Supreme Court, attached to a letter from him, dated 1 October 2003, informing him that his appeal had been dismissed on 20 December 1999, that the death sentence was confirmed, and that he was sentenced to an additional 18 years of imprisonment. The author claims that the Supreme Court issued its judgement in his presence on 4 December 1997, and not on 20 December 1999.

2.5 According to the author, once his death sentence was commuted in 1997, he was moved from death row to the section of the prison for prisoners serving long-term sentences, where he performed carpentry work. He claims that this can be verified in the prison records. He recalls that death row prisoners do not work. After two years of service, he was put back on death row on 1 November 1999.

2.6 By letter of 28 March 2004, the author informed the Committee that death row prisoners were being moved to the long-term section of the prison. He indicates that only those who had been on death row for more than ten years were covered by a Presidential amnesty for death row inmates. The author, who had been in prison for eleven years, was kept on death row because he had served two years in the long-term section of the prison and thus only spent nine years on death row.

The complaint

3.1 The author argues that his trial was not fair as he was convicted on the sole testimony of one witness, as the original of the medical report on the victim's wounds was never presented in Court, and because the weapon of the crime was not investigated with regard to finger prints. He contends that he was not presumed innocent, that his alibi witness was "denied", and that he was not given the chance adequately to prepare his defence, as his counsel was prevented from seeing him.

3.2 The author claims that he suffered inhuman treatment in prison because of the contradictory notifications concerning the outcome of his appeal and the resulting uncertainty about his sentence.

3.3 He argues that the crime for which he was sentenced to death, i.e. aggravated robbery with use of a firearm, is not one of the "most serious" crimes within the meaning of article 6, paragraph 2.

3.4 The author contends that the method of execution in Zambia, death by hanging, constitutes inhuman, cruel and degrading punishment, as it inflicts severe pain.

3.5 Although the author does not invoke the provisions of the Covenant, it appears from the allegations and the facts which he submitted that he claims to be a victim of a violation by Zambia of articles 14, paragraphs 1, 2, 3 (b), and 14, paragraph 5, together with article 2; 6, paragraph 2, and article 6, paragraph 4, together with article 2; and 7.

The State party's submission on the admissibility and merits of the communication and author's comments

4.1 By letter of 31 March, and note verbale of 12 May 2004, the State party commented on the admissibility and merits of the communication. It considers that "there is some confusion over the sentence that he [the author] has received". It refers to a judgement of the Supreme Court at Ndola dated 5 June 1996, in which it appears that his death sentence was upheld on the second count of conviction (aggravated robbery), and that he received an additional sentence of 18 years on the first count of conviction (attempted murder), on which the High Court had failed to sentence him. The State party submits a copy of this judgement.

4.2 The State party further claims that the author has not "completely" exhausted domestic remedies, as he is entitled to file a petition for Presidential mercy, under article 59 of the Zambian Constitution.

4.3 The State party underlines that although the death penalty still exists in law, its application has been restricted to the "most serious" crimes, namely for murder, treason and aggravated robbery with use of a firearm. A Constitutional Review Commission has been set up to facilitate the review of the current Constitution, and is hearing views from the public on various issues, including on the death penalty. The State party considers that "an opportunity for the abolition of the death penalty exists". As a result of this, the President has recently pardoned many death row prisoners or commuted their death sentences to long-term imprisonment.

5. By letters of 14 November 2004, 18 January and 3 April 2005, the author commented on the State party's submission. In reply to the State party's argument that he did not exhaust domestic remedies, he argues that he sent three petitions for clemency to the President in 2001, 2003 and 2004, but never received any reply. He acknowledges that his case was heard on 6 June 1996, but reaffirms that the judgement against him was issued on 4 December 1997, and that his death sentence was commuted to 18 years of imprisonment.

Issues and proceedings before the Committee

Admissibility considerations

6.1 Before considering any claim contained in a communication, the Human Rights Committee must, in accordance with rule 93 of its rules of procedure, decide whether or not the communication is admissible under the Optional Protocol to the Covenant.

6.2 The Committee has ascertained that the same matter is not being examined under another procedure of international investigation or settlement for purposes of article 5, paragraph 2 (a), of the Optional Protocol.

6.3 With respect to the State party's argument that the author did not exhaust domestic remedies in failing to request a Presidential pardon, the Committee notes that the author claims to have made three petitions for pardon which remained without reply and which claim is uncontested, and reiterates its jurisprudence[2] that presidential pardons are an extraordinary remedy and as such do not constitute an effective remedy for the purposes of article 5, paragraph 2 (b), of the Optional Protocol.

6.4 With regard to the author's claim under article 14, paragraph 1, in respect of the alleged unfairness of his trial, the Committee notes that this claim relates to the evaluation of facts and evidence by the domestic courts. The Committee refers to its prior jurisprudence and reiterates that it is generally for the appellate courts of States parties to the Covenant to evaluate facts and evidence in a particular case and that it is not for the Committee to review these issues, unless the appreciation of the domestic courts is manifestly arbitrary or amounts to a denial of justice.[3] The Committee considers that the author has failed to substantiate, for the purposes of admissibility, any such exceptional element in his present case, and this part of the communication is therefore inadmissible under article 2 of the Optional Protocol.

6.5 With regard to the claims under article 14, paragraph 2 that the author was not presumed innocent, and 14, paragraph 3 (b) in respect of his lack of opportunity to prepare his defence and to communicate with his counsel, the Committee notes that the author has not submitted any explanation or evidence in support of these claims and finds that this part of the communication is inadmissible under article 2 of the Optional Protocol, for lack of substantiation.

6.6 The Committee considers that the remaining claims under articles 14, paragraph 5 together with article 2; 7; 6, paragraph 2, and 6, paragraph 4, together with article 2 of the Covenant are admissible and proceeds to the consideration of the merits.

Consideration of the merits

7.1 The Human Rights Committee has considered the present communication in the light of all the information made available to it by the parties, as provided in article 5, paragraph 1, of the Optional Protocol.

7.2 With regard to the contradictory notifications about the outcome of the author's appeal to the Supreme Court, the Committee notes that the author and the State party have provided conflicting versions of the facts. According to the author, he was handed two verdicts on appeal, one commuting his death sentence to 18 years of imprisonment, the subsequent one upholding his death penalty and sentencing him to an additional 18 years of imprisonment. According to the State party, this is incorrect, as there is only one judgement, which upheld the death sentence and sentenced him to an additional 18 years imprisonment. It appears from the file that the author was informed by official notification of 4 December 1997 with the seal of the registry of the Supreme Court of Ndola, that his death sentence had been commuted. That the author was thereupon transferred from death row to the long term section of the prison and put to work has not been challenged by the State party. This comforted the author in his belief that his death sentence had indeed been commuted. In the light of the State party's failure to provide any explanation or comments clarifying this matter, due weight must be given to the author's allegations in this respect. The Committee considers that the State party has failed to explain how the author came to be notified that the death penalty had been set aside. It is insufficient to dismiss it as a matter of the author's confusion. Transferring him to the long-term section of the prison only shows that the confusion was not a matter of the author's misunderstanding. To act inconsistently with the notification document transmitted to the author, without further explanation, calls into question the manner in which the right of appeal guaranteed by article 14, paragraph 5, is executed, which in turn calls into question the nature of the remedy. The Committee finds that in acting in this manner, the State party has violated the author's right to an effective remedy in relation to his right to appeal, under article 14, paragraph 5 taken together with article 2.

7.3 The Committee further considers that to keep the author in doubt as to the result of his appeal, in particular by making him believe that his sentence had been commuted, only to inform him later that it was not, and by returning him to death row after two years in the long-term section, without an explanation on the part of the State, had such a negative psychological impact and left him in such continuing uncertainty, anguish and mental distress as to amount to cruel and inhuman treatment. The Committee finds that the State party violated the author's rights protected by article 7 of the Covenant in this context.

7.4 As to the author's claim that the crime for which he was sentenced to death, namely aggravated robbery in which a firearm was used, is not one of the "most serious crimes" within the meaning of article 6, paragraph 2, of the Covenant, the Committee recalls that the expression "most serious crimes" must be read restrictively and that death penalty should be an exceptional measure.[4] It refers to its jurisprudence in another case concerning the State party,[5] where it found that the mandatory imposition of the death penalty for aggravated robbery with use of firearms violated article 6, paragraph 2 of the Covenant. The Committee notes that the mandatory imposition of the death penalty under the laws of the State party is based solely upon the category of crime for which the offender is found guilty, without giving the judge any margin to evaluate the circumstances of the particular offence. The death penalty is mandatory for all cases of aggravated robbery with the use of firearms. The Committee considers that this mechanism of mandatory capital punishment would deprive the author of the benefit of the most fundamental of rights, the right to life, without considering whether this exceptional form of punishment could be appropriate in the circumstances of his case.[6] In the present case, the Committee notes that, although the victim of the crime was shot in the thigh, it did not result in loss of life and finds that the imposition of death penalty in this case violated the author's right to life protected by article 6 of the Covenant.

7.5 The Committee notes the author's allegations that he was transferred from death row to the long-term section of the prison for two years. After he had been transferred back to death row, the president issued an amnesty or commutation applicable to prisoners who had been on death row for more than ten years. The sentence imposed on the author, who had been in detention for 11 years, two of which he had served in the long-term section, was not commuted. In the absence of any clarifications of the State party in this regard, due weight must be given to the author's allegations. The Committee considers that taking him from death row and then refusing to apply to him the amnesty applicable to those who had been on death row for ten years, deprived the author of an effective remedy in relation to his right to seek amnesty or commutation as protected by article 6, paragraph 4, together with article 2 of the Covenant.

7.6 In the light of the finding that the death penalty imposed on the author is in violation of article 6 in respect of his right to life, the Committee considers that it is not necessary to address the issue of the method of execution in use in the State party in relation to article 7 of the Covenant.

8. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol, is of the view that the facts before it disclose a violation of articles 14, paragraph 5 together with article 2; 7; 6, paragraph 2 and 6, paragraph 4 together with article 2 of the International Covenant on Civil and Political Rights.

9. In accordance with article 2, paragraph 3 (a), of the Covenant, the State party is under an obligation to provide the author with a remedy, including as one necessary prerequisite in the particular circumstances, the commutation of the author's death sentence.

10. Bearing in mind that, by becoming a party to the Optional Protocol, the State party has recognized the competence of the Committee to determine whether there has been a violation of the Covenant or not, and that, pursuant to article 2 of the Covenant, the State party has

undertaken to ensure to all individuals within its territory or subject to its jurisdiction the rights recognized in the Covenant and to provide an effective and enforceable remedy in case a violation has been established, the Committee wishes to receive from the State party, within 90 days, information about the measures taken to give effect to the Committee's views.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently to be issued in Arabic, Chinese and Russian as part of the Committee's annual report to the General Assembly.]

Notes

[1] The Covenant and the Optional Protocol of the Covenant entered into force for the State party on 10 July 1984.

[2] See communication No. 1033/2001, *Nallaratnam Singarasa v. Sri Lanka*, Views adopted on 21 July 2004.

[3] See communication No. 541/1993, *Errol Simms v. Jamaica*, Views adopted on 3 April 1995, para. 6.2 and Communication 1169/2003, *Antonio Hom v. Philippines*, Inadmissibility Decision of 30 July 2003, para. 4.3.

[4] See general comment No. 6, para. 7.

[5] See communication No. 390/1990, *Lubuto v. Zambia*, Views adopted on 31 October 1995, para. 7.2.

[6] See communication No. 806/1998, *Eversley Thompson v. St. Vincent & the Grenadines*, Views adopted on 18 October 2000, para. 8.2.

AA. Communication No. 1152 and 1190/2003, *Ndong et al. & Mic Abogo v. Equatorial Guinea* (Views adopted on 31 October 2005, eighty-fifth session)*

Submitted by:	Patricio Ndong Bee (on behalf of himself and a further four victims) and María Jesús Bikene Obiang (on behalf of her husband, Plácido Micó Abogo) (represented by counsel, Mr. Fernando-Micó Nsue Andema)
Alleged victims:	Patricio Ndong Bee, Felipe Ondó Obiang Alogo, Guillermo Nguema Elá, Donato Ondó Ondó, Emilio Ndong Biyongo and Plácido Micó Abogo
State party:	Equatorial Guinea
Date of communications:	20 August 2002 and 25 April 2003 (initial submissions)
Subject matter:	Detention, torture, trial and conviction of opponents of the Government of Equatorial Guinea
Procedural issues:	Lack of exhaustion of domestic remedies
Substantive issues:	Arbitrary detention, torture, right to an effective remedy, right to a trial with minimum guarantees
Articles of the Covenant:	2, paragraph 3 (a) and (b), 7, 9, paragraphs 1, 2, 3, 4 and 5, 14, paragraph 3 (a), (b), (c) and (d)
Articles of the Optional Protocol:	1, 2 and 5, paragraph 2 (b)

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 31 October 2005,

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* The following members of the Committee participated in the examination of the present communication: Mr. Nisuke Ando, Mr. Prafullachandra Natwarlal Bhagwati, Mr. Alfredo Castillero Hoyos, Ms. Christine Chanet, Mr. Maurice Glèlè Ahanhanzo, Mr. Edwin Johnson, Mr. Walter Kälin, Mr. Ahmed Tawfik Khalil, Mr. Michael O'Flaherty, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Ivan Shearer, Mr. Hipólito Solari-Yrigoyen, Ms. Ruth Wedgwood and Mr. Roman Wieruszewski.

The text of an individual opinion by Committee member Mr. Nisuke Ando is appended to the present document.

Having concluded its consideration of communications Nos. 1152/2003 and 1190/2003, submitted on behalf of Patricio Ndong Bee, Felipe Ondó Obiang, Guillermo Nguema Elá, Donato Ondó Ondó and Emilio Ndong Biyongo and on behalf of Plácido Micó Abogo, under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the author of the communication and the State party,

Adopts the following:

Views under article 5, paragraph 4, of the Optional Protocol

1.1 The two communications submitted refer to the same facts. The author of communication No. 1152/2003 (first communication) of 20 August 2002 is Patricio Ndong Bee, a citizen of Equatorial Guinea, currently a prisoner in Black Beach Prison, Malabo. He claims to be acting on behalf of himself and another four inmates of the same prison, Felipe Ondó Obiang, Guillermo Ngema Elá, Donato Ondó Ondó and Emilio Ndong Biyongo,[1] who are being held incommunicado. The author of communication No. 1190/2003 (second communication) of 25 April 2003 is María Jesús Bikene Obiang, a citizen of Equatorial Guinea. She is acting on behalf of her husband, Plácido Micó Abogo, who is currently imprisoned incommunicado in the aforementioned prison.[2]

1.2 The authors allege that they are victims of violations by Equatorial Guinea of articles 2, paragraph 3 (a) and (b), 7, 9, paragraphs 1 to 5, and 14, paragraph 3 (a), (b), (c) and (d), of the Covenant. The communications also raise questions relating to article 14, paragraphs 1 and 3 (g), of the Covenant. The Optional Protocol to the Covenant entered into force for Equatorial Guinea on 25 December 1987. The authors are represented by counsel, Fernando-Micó Nsue Andeme.

1.3 Under rule 94 of its rules of procedure, the Committee has decided to consider the two communications jointly.

Factual background

2.1 The five alleged victims of the first communication were supposedly linked to the Fuerza Demócrata Republicana (FDR), an unofficial political party in opposition to the Government, and were detained in Malabo, along with another 150 persons, between the end of February and March 2002. The alleged victims were held in Black Beach Prison, Malabo, without being notified of the charges against them until 20 May 2002, that is, two days before their trial, when the indictment was read out to them.

2.2 Plácido Micó Abogo, the alleged victim in the second communication, was the secretary-general of the Convergencia para la Democracia Social (CPDS), a legal opposition party. After being questioned on several occasions in April and May 2002, he was kept under house arrest until the date of the trial.

2.3 The trial of 144 opponents of the regime, including the alleged victims of both communications, was held in Malabo from 23 May to 6 June 2002. The authors claim that the five members of the court included two high-ranking military officers, and that the alleged victims were not allowed to prepare their defence or appoint defence lawyers; the lawyers who defended them during the trial were officially assigned by the Government through the person of the Prime Minister and had only a day to examine the charges. The authors also claim that the alleged victims were interrogated in Black Beach Prison, where the military prosecutor took note of their statements in the presence of the officers who had interrogated and allegedly tortured them, that some of the accused were sentenced without being given an opportunity to attend the trial, and that the proceedings had suffered undue delays.

2.4 The authors claim that the alleged victims, like the other detainees, were subjected to torture and ill-treatment during their detention and trial, and that the majority were unable to stand on their feet or hold a pen to sign their names during the oral proceedings as a result of the ill-treatment they had received. Of all the individuals tried, 65 were convicted, allegedly solely on the basis of their confessions under torture. They further maintain that after sentencing they continued to be subjected to torture, for example, by being left for five consecutive days without food or drink; this caused the death of one of those convicted. It is also reported that two more alleged victims in the first communication, Guillermo Nguema Elá and Donato Ondó Ondó, may become paralysed in the near future as a result of the torture they have suffered and the lack of medical care.

2.5 The author of the first communication claims to have filed a petition for annulment of proceedings and an application for judicial review of the sentence. The author of the second communication for her part claims to have filed a petition for annulment of the sentence. Both authors allege that, when they submitted their communications, these remedies had not been allowed and that this meant that there was no possibility of their being allowed since the three-month deadline for acceptance established in the procedural laws of Equatorial Guinea had expired. The author of the first communication has supplied a copy of a petition for annulment of proceedings filed with the Supreme Court on 17 June 2002, alleging acts of torture and irregularities in the proceedings.

The complaint

3.1 The authors claim a violation of article 7 of the Covenant, since the alleged victims were subjected to constant torture and ill-treatment both during their detention and trial and subsequently.

3.2 The authors claim that the alleged victims were arrested arbitrarily at the end of February 2002 without being informed of the reason for this until two days before the trial, which was held more than two months after the arrests, which they contend is a violation of article 9, paragraphs 1 to 5, of the Covenant.

3.3 The authors also consider that there was a violation of article 14, paragraph 3 (a), (b), (c) and (d), of the Covenant because the alleged victims were not granted the minimum guarantees during proceedings; they were not notified of the charges until two days before the trial, they were not allowed to prepare their defence or choose their counsel, the court was partially composed of military personnel, they were forced to sign their confessions under torture, their statements were taken in the prison where they were held and there were undue delays during the proceedings.

3.4 The authors claim a violation of article 2, paragraph 3 (a) and (b), of the Covenant, since the State party did not respect its commitment to guarantee the right of the prisoners to file an effective remedy against the torture, the illegal detention and the ill-treatment to which they were and still are subjected.

3.5 The allegations in paragraph 3.3 above raise issues concerning article 14, paragraph 3 (g), of the Covenant.

Failure of the State party to cooperate

4. On 8 January and 26 June 2003 respectively the State party was requested to submit observations on the admissibility and the merits of the authors' allegations within six months. Since on neither occasion was a reply received, reminders were sent to the State party on 20 September and 18 November 2004. The Committee notes that the observations have not been received. The Committee regrets the lack of cooperation on the part of the State party and recalls that article 4, paragraph 2, of the Optional Protocol requires the State party to consider in good faith all the accusations made against it and to submit all available information to the Committee in writing. In that the State party has not cooperated with the Committee on the matters brought to its attention, the authors' assertions must be given their due importance insofar as they appear justified.

Issues and proceedings before the Committee

Considerations as to admissibility

5.1 In accordance with rule 93 of its rules of procedure, before considering any claim contained in a communication, the Human Rights Committee must decide whether or not the communication is admissible under the Optional Protocol to the Covenant on Civil and Political Rights.

5.2 The Committee is of the view that the authors have justified their authority to act on behalf of the alleged victims in the incommunicado situation in which they are apparently being held. Consequently, the Committee concludes that the authors have locus standi, under article 1 of the Optional Protocol, to proceed with the communications.[3]

5.3 The Committee has ascertained that the same matter is not being examined under another procedure of international investigation or settlement, in compliance with the provisions of article 5, paragraph 2 (a), of the Optional Protocol.

5.4 With regard to the requirement that domestic remedies should be exhausted, the Committee reaffirms its established jurisprudence that it is only necessary to exhaust those remedies that have some prospect of success. The Committee takes note that the authors filed such remedies as the law permits against their conviction, but that these were not even allowed within the deadline established for the purpose under domestic procedural laws. In the absence of relevant information from the State party, the Committee considers that the authors have exhausted domestic resources and that there is nothing to prevent it, under article 5, paragraph 2 (b), of the Optional Protocol from considering the communications.

5.5 With regard to the authors' contention that the proceedings suffered undue delays, the Committee observes that proceedings were initiated on 23 May 2002 and that the verdict was handed down on 6 June 2002. The Committee considers that the authors have not sufficiently substantiated this part of the communications and therefore decides that it is inadmissible under article 2 of the Optional Protocol.

5.6 The Committee consequently declares the communication admissible with regard to the alleged violations of articles 7, 9 and 14, paragraph 3 (a), (b), (d) and (g), of the Covenant, and proceeds to consideration of the merits.

Consideration of the merits

6.1 The Committee takes note of the authors' claims that the alleged victims were subjected to treatment incompatible with article 7 of the Covenant. The authors have described various instances of ill-treatment to which they were apparently subjected, such as being deprived of food and drink for five consecutive days. In the absence of a reply from the State party challenging these allegations, the Committee considers that they should be given their due weight and finds that there has been a violation of article 7 of the Covenant.

6.2 The Committee notes that the authors claim that the alleged victims were held for a period of two months without being notified of the reasons and without being brought before a court. In the absence of a reply from the State party contradicting these allegations, the Committee finds that they should be given their due weight, and that the facts described disclose a violation of the authors' right to liberty and security of person and specifically the right not to be arbitrarily detained and imprisoned. Consequently, the Committee finds that article 9 of the Covenant has been violated.

6.3 The Committee takes note of the authors' complaint that the alleged victims were not notified of the grounds for the charges against them until two days before the trial, depriving them of sufficient time to prepare their defence and making it impossible for them to select their defence lawyers, that the court was partially composed of military personnel and that they were forcibly compelled to sign their confessions. In the absence of a reply from the State party contradicting these allegations, the Committee finds that the facts described disclose a violation of article 14, paragraphs 1 and 3 (a), (b), (d) and (g), in conjunction with article 2, paragraph 3 (a) and (b) of the Covenant.

7. Accordingly, the Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts before it disclose a violation of articles 7, 9, 14, paragraph 3 (a), (b), (d) and (g), and article 2, paragraph 3 (a) and (b), of the Covenant.

8. In accordance with article 2, paragraph 3, of the Covenant, the State party is required to provide the victims with an effective remedy that entails their immediate release and includes adequate compensation, and also to make the same solution available to other detainees and convicted prisoners in the same situation as the authors and to take steps to ensure that the violations cease and that similar violations do not occur in future.

9. Bearing in mind that, by becoming a State party to the Optional Protocol, the State party has recognized the competence of the Committee to determine whether there has been a violation of the Covenant or not and that, pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the Covenant and to provide an effective and enforceable remedy if a violation has been established, the Committee wishes to receive from the State party, within 90 days, information about the measures taken to give effect to the Committee's Views.

[Adopted in English, French and Spanish, the Spanish text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the Committee's annual report to the General Assembly.]

Notes

[1] On 15 October 2002, relatives of Felipe Ondó Obiang and Guillermo Ngema Elá confirmed the validity of the complaint submitted to the Committee on their behalf.

[2] Newspaper reports obtained subsequently by the Committee reveal that Plácido Micó Abogo, the alleged victim in the second communication, was released on 2 August 2003.

[3] See, inter alia, communications No. 5/1977, *Massera v. Uruguay*, decision of 15 August 1979, para. 5 (a); 8/1977, *Perdomo v. Uruguay*, decision of 3 April 1980, para. 6 (a); 161/1983, *Herrera Rubio v. Colombia*, decision of 2 November 1987, para. 5; 194/1985, *Miango v. Zaire*, decision of 27 October 1987, para. 3; 1138/2002, *Arenz v. Germany*, decision of 26 September 2002, para. 8.4. With regard to persons held in pretrial detention, see 1090/2002, *Rameka v. New Zealand*, decision of 15 December 2003, para. 6.2.

APPENDIX

Individual concurring opinion by Committee member Mr. Nisuke Ando

I do not oppose the adoption by the Committee of the Views in this case. However, I would like to express the following concern of mine:

The case concerns two communications coming from different authors. The second author is acting on behalf of her husband who is currently imprisoned incommunicado in Black Beach Prison, Malabo. Since the Committee has in the past admitted an author acting on behalf of his/her close family member, I do not have any problem in this regard. However, the first author is acting on behalf of not only himself but also four other inmates in the same prison.

These five alleged victims claim that they are victims of violations of their rights under article 7 of the Covenant, and the Committee recognizes it by referring to "various instances of ill-treatment … such as being deprived of food and drink for five consecutive days" (6.1). In my opinion, the types and severity of such ill-treatment may not be the same with all of the five and instances of ill-treatment need to be separately identified with each one to constitute a violation of their rights under article 7.

In this connection, the Committee is of the view that the first and second authors "have justified their authority to act on behalf of the alleged (other) victims in the incommunicado situation in which they are apparently being held" and that all "the authors have locus standi, under … the Optional Protocol" (5.2). I could agree to the Views only on the assumption that the first author and his four inmates were sharing in common the information about concrete cases of their ill-treatment.

(*Signed*): Nisuke Ando

[Done in English, French and Spanish, the English text being the original version. Subsequently to be issued in Arabic, Chinese and Russian as part of the Committee's annual report to the General Assembly.]

BB. Communication No. 1153/2003, *K.N.L.H. v. Peru* (Views adopted on 24 October 2005, eighty-fifth session)*

Communication No. 1153/2003

Submitted by:	K.N.L.H. (represented by the organizations DEMUS, CLADEM and Center for Reproductive Law and Policy)
Alleged victim:	The author
State party:	Peru
Date of communication:	13 November 2002 (initial submission)
Subject matter:	Refusal to provide medical services to the author in connection with a therapeutic abortion which is not a punishable offence and for which express provision has been made in the law.
Procedural issues:	Substantiation of the alleged violation - unavailability of effective domestic remedies.
Substantive issues:	Right to an effective remedy; right to equality between men and women; right to life, right not to be subjected to cruel, inhuman or degrading treatment; right not to be the victim of arbitrary or unlawful interference in one's privacy; right to such measures of protection as are required by the status of a minor and right to equality before the law.
Articles of the Covenant:	2, 3, 6, 7, 17, 24 and 26
Article of the Optional Protocol:	2

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* The following members of the Committee participated in the examination of the present communication: Mr. Prafullachandra Natwarlal Bhagwati, Ms. Christine Chanet, Mr. Maurice Glèlè Ahanhanzo, Mr. Edwin Johnson, Mr. Walter Kälin, Mr. Ahmed Tawfik Khalil, Mr. Rajsoomer Lallah, Mr. Michael O'Flaherty, Ms. Elisabeth Palm, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Ivan Shearer, Mr. Hipólito Solari-Yrigoyen and Mr. Roman Wieruszewski.

The text of an individual opinion signed by Committee member Mr. Hipólito Solari-Yrigoyen is appended to the present document.

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 24 October 2005,

Having concluded its consideration of communication No. 1153/2003, submitted on behalf of Ms. K.N.L.H. under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the author of the communication and the State party,

Adopts the following:

Views under article 5 paragraph 4 of the Optional Protocol

1. The author of the communication is K.N.L.H., born in 1984, who claims to be a victim of a violation by Peru of articles 2, 3, 6, 7, 17, 24 and 26 of the International Covenant on Civil and Political Rights. She is represented by the organizations DEMUS, CLADEM and Center for Reproductive Law and Policy. The Optional Protocol entered into force for Peru on 3 October 1980.

Factual background

2.1 The author became pregnant in March 2001, when she was aged 17. On 27 June 2001 she was given a scan at the Archbishop Loayza National Hospital in Lima, part of the Ministry of Health. The scan showed that she was carrying an anencephalic foetus.

2.2 On 3 July 2001, Dr. Ygor Pérez Solf, a gynaecologist and obstetrician in the Archbishop Loayza National Hospital in Lima, informed the author of the foetal abnormality and the risks to her life if the pregnancy continued. Dr. Pérez said that she had two options: to continue the pregnancy or to terminate it. He advised termination by means of uterine curettage. The author decided to terminate the pregnancy, and the necessary clinical studies were carried out, confirming the foetal abnormality.

2.3 On 19 July 2001, when the author reported to the hospital together with her mother for admission preparatory to the operation, Dr. Pérez informed her that she needed to obtain written authorization from the hospital director. Since she was under age, her mother, Ms. E.H.L., requested the authorization. On 24 July 2001, Dr. Maximiliano Cárdenas Díaz, the hospital director, replied in writing that the termination could not be carried out as to do so would be unlawful, since under article 120 of the Criminal Code, abortion was punishable by a prison term of no more than three months when it was likely that at birth the child would suffer serious physical or mental defects, while under article 119, therapeutic abortion was permitted only when termination of the pregnancy was the only way of saving the life of the pregnant woman or avoiding serious and permanent damage to her health.

2.4 On 16 August 2001, Ms. Amanda Gayoso, a social worker and member of the Peruvian association of social workers, carried out an assessment of the case and concluded that medical intervention to terminate the pregnancy was advisable "since its continuation would only prolong the distress and emotional instability of K.N.L.H. and her family". However, no intervention took place owing to the refusal of the Health Ministry medical personnel.

2.5 On 20 August 2001, Dr. Marta B. Rondón, a psychiatrist and member of the Peruvian Medical Association, drew up a psychiatric report on the author, concluding that "the so-called principle of the welfare of the unborn child has caused serious harm to the mother, since she has unnecessarily been made to carry to term a pregnancy whose fatal outcome was known in advance, and this has substantially contributed to triggering the symptoms of depression, with its severe impact on the development of an adolescent and the patient's future mental health".

2.6 On 13 January 2002, three weeks late with respect to the anticipated date of birth, the author gave birth to an anencephalic baby girl, who survived for four days, during which the mother had to breastfeed her. Following her daughter's death, the author fell into a state of deep depression. This was diagnosed by the psychiatrist Marta B. Rondón. The author also states that she suffered from an inflammation of the vulva which required medical treatment.

2.7 The author has submitted to the Committee a statement made by Dr. Annibal Faúdes and Dr. Luis Tavara, who are specialists from the association called Center for Reproductive Rights, and who on 17 January 2003 studied the author's clinical dossier and stated that anencephaly is a condition which is fatal to the foetus in all cases. Death immediately follows birth in most cases. It also endangers the mother's life. In their opinion, in refusing to terminate the pregnancy, the medical personnel took a decision which was prejudicial to the author.

2.8 Regarding the exhaustion of domestic remedies, the author claims that this requirement is waived when judicial remedies available domestically are ineffective in the case in question, and she points out that the Committee has laid down on several occasions that the author has no obligation to exhaust a remedy which would prove ineffective. She adds that in Peru there is no administrative remedy which would enable a pregnancy to be terminated on therapeutic grounds, nor any judicial remedy functioning with the speed and efficiency required to enable a woman to require the authorities to guarantee her right to a lawful abortion within the limited period, by virtue of the special circumstances obtaining in such cases. She also states that her financial circumstances and those of her family prevented her from obtaining legal advice.

2.9 The author states that the complaint is not being considered under any other procedure of international settlement.

The complaint

3.1 The author claims a violation of article 2 of the Covenant, since the State party failed to comply with its obligation to guarantee the exercise of a right. The State should have taken steps to respond to the systematic reluctance of the medical community to comply with the legal provision authorizing therapeutic abortion, and its restrictive interpretation thereof. This restrictive interpretation was clear in the author's case, in which a pregnancy involving an anencephalic foetus was considered not to endanger her life and health. The State should have taken steps to ensure that an exception could be made to the rule criminalizing abortion, so that, in cases where the physical and mental health of the mother was at risk, she could undergo an abortion in safety.

3.2 The author claims to have suffered discrimination in breach of article 3 of the Covenant, in the following forms:

(a) In access to the health services, since her different and special needs were ignored because of her sex. In the view of the author, the fact that the State lacked any means to prevent a violation of her right to a legal abortion on therapeutic grounds, which is applicable only to women, together with the arbitrary conduct of the medical personnel, resulted in a discriminatory practice that violated her rights - a breach which was all the more serious since the victim was a minor;

(b) Discrimination in the exercise of her rights, since although the author was entitled to a therapeutic abortion, none was carried out because of social attitudes and prejudices, thus preventing her from enjoying her right to life, to health, to privacy and to freedom from cruel, inhuman and degrading treatment on an equal footing with men;

(c) Discrimination in access to the courts, bearing in mind the prejudices of officials in the health system and the judicial system where women are concerned and the lack of appropriate legal means of enforcing respect for the right to obtain a legal abortion when the temporal and other conditions laid down in the law are met.

3.3 The author claims a violation of article 6 of the Covenant. She states that her experience had a serious impact on her mental health from which she has still not recovered. She points out that the Committee has stated that the right to life cannot be interpreted in a restrictive manner, but requires States to take positive steps to protect it, including the measures necessary to ensure that women do not resort to clandestine abortions which endanger their life and health, especially in the case of poor women. She adds that the Committee has viewed lack of access for women to reproductive health services, including abortion, as a violation of women's right to life, and that this has been reiterated by other committees such as the Committee on the Elimination of Discrimination against Women and the Committee on Economic, Social and Cultural Rights. The author claims that in the present case, the violation of the right to life lay in the fact that Peru did not take steps to ensure that the author secured a safe termination of pregnancy on the grounds that the foetus was not viable. She states that the refusal to provide a legal abortion service left her with two options which posed an equal risk to her health and safety: to seek clandestine (and hence highly risky) abortion services, or to continue a dangerous and traumatic pregnancy which put her life at risk.

3.4 The author claims a violation of article 7 of the Covenant. The fact that she was obliged to continue with the pregnancy amounts to cruel and inhuman treatment, in her view, since she had to endure the distress of seeing her daughter's marked deformities and knowing that her life expectancy was short. She states that this was an awful experience which added further pain and distress to that which she had already borne during the period when she was obliged to continue with the pregnancy, since she was subjected to an "extended funeral" for her daughter, and sank into a deep depression after her death.

3.5 The author points out that the Committee has stated that the prohibition in article 7 of the Covenant relates not only to physical pain but also to mental suffering, and that this protection is particularly important in the case of minors.[1] She points out that, after considering Peru's report in 1996, the Committee expressed the view that restrictive provisions on abortion subjected women to inhumane treatment, in violation of article 7 of the Covenant, and that in 2000, the Committee reminded the State party that the criminalization of abortion was incompatible with articles 3, 6 and 7 of the Covenant.[2]

3.6 The author claims a violation of article 17, arguing that this article protects women from interference in decisions which affect their bodies and their lives, and offers them the opportunity to exercise their right to make independent decisions on their reproductive lives. The author points out that the State party interfered arbitrarily in her private life, taking on her behalf a decision relating to her life and reproductive health which obliged her to carry a pregnancy to term, and thereby breaching her right to privacy. She adds that the service was available, and that if it had not been for the interference of State officials in her decision, which enjoyed the protection of the law, she would have been able to terminate the pregnancy. She reminds the Committee that children and young people enjoy special protection by virtue of their status as minors, as recognized in article 24 of the Covenant and in the Convention on the Rights of the Child.

3.7 The author claims a violation of article 24, since she did not receive the special care she needed from the health authorities, as an adolescent girl. Neither her welfare nor her state of health were objectives pursued by the authorities which refused to carry out an abortion on her. The author points out that the Committee laid down in its general comment No. 17, relating to article 24, that the State should also adopt economic, social and cultural measures to safeguard this right. For example, every possible economic and social measure should be taken to reduce infant mortality and to prevent children from being subjected to acts of violence or cruel or inhuman treatment, among other possible violations.

3.8 The author claims a violation of article 26, arguing that the Peruvian authorities' position that hers was not a case of therapeutic abortion, which is not punishable under the Criminal Code, left her in an unprotected state incompatible with the assurance of the protection of the law set out in article 26. The guarantee of the equal protection of the law implies that special protection will be given to certain categories of situation in which specific treatment is required. In the present case, as a result of a highly restrictive interpretation of the criminal law, the health authorities failed to protect the author and neglected the special protection which her situation required.

3.9 The author claims that the administration of the health centre left her without protection as a result of a restrictive interpretation of article 119 of the Criminal Code. She adds that the text of the law contains nothing to indicate that the exception relating to therapeutic abortion should apply only in cases of danger to physical health. But the hospital authorities had drawn a distinction and divided up the concept of health, and had thus violated the legal principle that no distinction should be drawn where there is none in the law. She points out that health is "a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity", so that when the Peruvian Criminal Code refers to health, it does so in the broad and all-embracing sense, protecting both the physical and the mental health of the mother.

State party's failure to cooperate under article 4 of the Optional Protocol

4. On 23 July 2003, 15 March 2004 and 25 October 2004, reminders were sent to the State party inviting it to submit information to the Committee concerning the admissibility and the merits of the complaint. The Committee notes that no such information has been received. It regrets that the State party has not supplied any information concerning the admissibility or the merits of the author's allegations. It points out that it is implicit in the Optional Protocol that States parties make available to the Committee all information at their disposal. In the absence of a reply from the State party, due weight must be given to the author's allegations, to the extent that these have been properly substantiated.[3]

Issues and proceedings before the Committee

Consideration of admissibility

5.1 In accordance with rule 93 of the rules of procedure, before examining the claims made in a communication, the Human Rights Committee must decide whether the communication is admissible under the Optional Protocol to the Covenant.

5.2 The Committee notes that, according to the author, the same matter has not been submitted under any other procedure of international investigation. The Committee also takes note of her arguments to the effect that in Peru there is no administrative remedy which would enable a pregnancy to be terminated on therapeutic grounds, nor any judicial remedy functioning with the speed and efficiency required to enable a woman to require the authorities to guarantee her right to a lawful abortion within the limited period, by virtue of the special circumstances obtaining in such cases. The Committee recalls its jurisprudence to the effect that a remedy which had no chance of being successful could not count as such and did not need to be exhausted for the purposes of the Optional Protocol.[4] In the absence of a reply from the State party, due weight must be given to the author's allegations. Consequently, the Committee considers that the requirements of article 5, paragraph 2 (a) and (b), have been met.

5.3 The Committee considers that the author's claims of alleged violations of articles 3 and 26 of the Covenant have not been properly substantiated, since the author has not placed before the Committee any evidence relating to the events which might confirm any type of discrimination under the article in question. Consequently, the part of the complaint referring to articles 3 and 26 is declared inadmissible under article 2 of the Optional Protocol.

5.4 The Committee notes that the author has claimed a violation of article 2 of the Covenant. The Committee recalls its constant jurisprudence to the effect that article 2 of the Covenant, which lays down general obligations for States, is accessory in nature and cannot be invoked in isolation by individuals under the Optional Protocol.[5] Consequently, the complaint under article 2 will be analysed together with the author's other allegations.

5.5 Concerning the allegations relating to articles 6, 7, 17 and 24 of the Covenant, the Committee considers that they are adequately substantiated for purposes of admissibility, and that they appear to raise issues in connection with those provisions. Consequently, it turns to consideration of the substance of the complaint.

Consideration of the merits

6.1 The Human Rights Committee has considered the present complaint in the light of all the information received, in accordance with article 5, paragraph 1, of the Optional Protocol.

6.2 The Committee notes that the author attached a doctor's statement confirming that her pregnancy exposed her to a life-threatening risk. She also suffered severe psychological consequences exacerbated by her status as a minor, as the psychiatric report of 20 August 2001 confirmed. The Committee notes that the State party has not provided any evidence to challenge the above. It notes that the authorities were aware of the risk to the author's life, since a gynaecologist and obstetrician in the same hospital had advised her to terminate the pregnancy, with the operation to be carried out in the same hospital. The subsequent refusal of the competent medical authorities to provide the service may have endangered the author's life. The author states that no effective remedy was available to her to oppose that decision. In the absence of any information from the State party, due weight must be given to the author's claims.

6.3 The author also claims that, owing to the refusal of the medical authorities to carry out the therapeutic abortion, she had to endure the distress of seeing her daughter's marked deformities and knowing that she would die very soon. This was an experience which added further pain and distress to that which she had already borne during the period when she was obliged to continue with the pregnancy. The author attaches a psychiatric certificate dated 20 August 2001, which confirms the state of deep depression into which she fell and the severe consequences this caused, taking her age into account. The Committee notes that this situation could have been foreseen, since a hospital doctor had diagnosed anencephaly in the foetus, yet the hospital director refused termination. The omission on the part of the State in not enabling the author to benefit from a therapeutic abortion was, in the Committee's view, the cause of the suffering she experienced. The Committee has pointed out in its general comment No. 20 that the right set out in article 7 of the Covenant relates not only to physical pain but also to mental suffering, and that the protection is particularly important in the case of minors.[6] In the absence of any information from the State party in this regard, due weight must be given to the author's complaints. Consequently, the Committee considers that the facts before it reveal a violation of article 7 of the Covenant. In the light of this finding the Committee does not consider it necessary in the circumstances to make a finding on article 6 of the Covenant.

6.4 The author states that the State party, in denying her the opportunity to secure medical intervention to terminate the pregnancy, interfered arbitrarily in her private life. The Committee notes that a public-sector doctor told the author that she could either continue with the pregnancy or terminate it in accordance with domestic legislation allowing abortions in cases of risk to the life of the mother. In the absence of any information from the State party, due weight must be given to the author's claim that at the time of this information, the conditions for a lawful abortion as set out in the law were present. In the circumstances of the case, the refusal to act in accordance with the author's decision to terminate her pregnancy was not justified and amounted to a violation of article 17 of the Covenant.

6.5 The author claims a violation of article 24 of the Covenant, since she did not receive from the State party the special care she needed as a minor. The Committee notes the special vulnerability of the author as a minor girl. It further note that, in the absence of any information from the State party, due weight must be given to the author's claim that she did not receive, during and after her pregnancy, the medical and psychological support necessary in the specific circumstances of her case. Consequently, the Committee considers that the facts before it reveal a violation of article 24 of the Covenant.

6.6 The author claims to have been a victim of violation of articles 2 of the Covenant on the grounds that she lacked an adequate legal remedy. In the absence of information from the State party, the Committee considers that due weight must be given to the author's claims as regards lack of an adequate legal remedy and consequently concludes that the facts before it also reveal a violation of article 2 in conjunction with articles 7, 17 and 24.7. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the Covenant, is of the view that the facts before it disclose a violation of articles 2, 7, 17 and 24 of the Covenant.

7. In accordance with article 2, paragraph 3 (a), of the Covenant, the State party is required to furnish the author with an effective remedy, including compensation. The State party has an obligation to take steps to ensure that similar violations do not occur in the future.

8. Bearing in mind that, as a party to the Optional Protocol, the State party recognizes the competence of the Committee to determine whether there has been a violation of the Covenant, and that, under article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the Covenant and to offer an effective and enforceable remedy when a violation is found to have occurred, the Committee wishes to receive from the State party, within 90 days, information about the measures taken to give effect to the present Views. The State party is also requested to publish the Committee's Views.

[Adopted in English, French and Spanish, the Spanish text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the Committee's annual report to the General Assembly.]

Notes

[1] Human Rights Committee, general comment No. 20, 10 March 1992 (HRI/GEN/1/Rev.7), paras. 2 and 5.

[2] Concluding observations of the Human Rights Committee: Peru, 15 November 2000 (CCPR/CO/70/PER), para. 20.

[3] See communication No. 760/1997, *J.G.A. Diergaart et al. v. Namibia*; Views adopted on 25 July 2000, para. 10.2, and communication No. 1117/2002, *Saodat Khomidova v. Tajikistan*; Views adopted on 29 July 2004, para. 4.

[4] See communication No. 701/1996, *Cesáreo Gómez Vázquez v. Spain*; Views adopted on 20 July 2000, para. 6.2.

[5] See communication No. 802/1998, *Andrew Rogerson v. Australia*; Views adopted on 3 April 2002, para. 7.9.

[6] Human Rights Committee, general comment No. 20: Prohibition of torture and other cruel, inhuman or degrading treatment or punishment (art. 7), 10 March 1992 (HRI/GEN/1/Rev.7, paras. 2 and 5).

APPENDIX

Dissenting opinion by Committee member Hipólito Solari-Yrigoyen

My dissenting opinion on this communication - the majority not considering that article 6 of the Covenant was violated - is based on the following grounds:

Consideration of the merits

The Committee notes that when the author was a minor, she and her mother were informed by the obstetric gynaecologist at Lima National Hospital, whom they had consulted because of the author's pregnancy, that the foetus suffered from anencephaly which would inevitably cause its death at birth. The doctor told the author that she had two options: (1) continue the pregnancy, which would endanger her own life; or (2) terminate the pregnancy by a therapeutic abortion. He recommended the second option. Given this conclusive advice from the specialist who had told her of the risks to her life if the pregnancy continued, the author decided to follow his professional advice and accepted the second option. As a result, all the clinical tests needed to confirm the doctor's statements about the risks to the mother's life of continuing the pregnancy and the inevitable death of the foetus at birth were performed.

The author substantiated with medical and psychological certificates all her claims about the fatal risk she ran if the pregnancy continued. In spite of the risk, the director of the public hospital would not authorize the therapeutic abortion which the law of the State party allowed, arguing that it would not be a therapeutic abortion but rather a voluntary and unfounded abortion punishable under the Criminal Code. The hospital director did not supply any legal ruling in support of his pronouncements outside his professional field or challenging the medical attestations to the serious risk to the mother's life. Furthermore, the Committee may note that the State party has not submitted any evidence contradicting the statements and evidence supplied by the author. Refusing a therapeutic abortion not only endangered the author's life but had grave consequences which the author has also substantiated to the Committee by means of valid supporting documents.

It is not only taking a person's life that violates article 6 of the Covenant but also placing a person's life in grave danger, as in this case. Consequently, I consider that the facts in the present case reveal a violation of article 6 of the Covenant.

(*Signed*): Hipólito Solari-Yrigoyen

[Done in English, French and Spanish, the Spanish text being the original version. Subsequently to be issued in Arabic, Chinese and Russian as part of the Committee's annual report to the General Assembly.]

CC. Communication No. 1156/2003, *Pérez Escolar v. Spain* (Views adopted on 28 March 2006, eighty-sixth session)*

Submitted by:	Rafael Pérez Escolar (represented by counsel)
Alleged victim:	The author
State party:	Spain
Date of communication:	13 December 2002 (initial submission)
Subject matter:	Scope of review in cassation proceedings in the Spanish Supreme Court; imposition of heavier penalties by the higher court
Procedural issues:	
Substantive issues:	Right to have sentence and conviction reviewed by a higher court in accordance with the law
Article of the Covenant:	14, paragraph 5
Article of the Optional Protocol:	

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 28 March 2006,

Having concluded its consideration of communication No. 1156/2003, submitted to the Human Rights Committee on behalf of Mr. Rafael Pérez Escolar under the Optional Protocol to the International Covenant on Civil and Political Rights,

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* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Nisuke Ando, Mr. Prafullachandra Natwarlal Bhagwati, Ms. Christine Chanet, Mr. Maurice Glèlè Ahanhanzo, Mr. Edwin Johnson, Mr. Ahmed Tawfik Khalil, Mr. Rajsoomer Lallah, Ms. Elisabeth Palm, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Ivan Shearer, Mr. Hipólito Solari-Yrigoyen and Mr. Roman Wieruszewski.

Having taken into account all written information made available to it by the author of the communication and the State party,

Adopts the following:

Views under article 5, paragraph 4, of the Optional Protocol

1. The author of the communication, dated 13 December 2002, is Rafael Pérez Escolar, a Spanish national born in 1927, who claims to be a victim of a violation by Spain of article 14, paragraph 5, of the Covenant. The Optional Protocol entered into force for Spain on 25 April 1985. The author is represented by counsel, Mr. Iván Hernández Urraburu and Mr. José Luis Mazón Costa.

Factual background

2.1 The author was a shareholder and board member of the Banco Español de Crédito (BANESTO). On 28 December 1993 he was dismissed from his post along with the other board members.

2.2 On 14 November 1994, the prosecutor's office attached to the National High Court brought criminal proceedings against 10 individuals, including the author, for forgery of a commercial document and misappropriation. In the course of the hearings, which lasted two years, statements were taken from 470 witnesses and expert witnesses. The case file consisted of 53 volumes of pretrial proceedings and 121 volumes of evidence. The author was accused of involvement in 3 out of 11 allegedly irregular operations approved by the management of BANESTO. On 31 March 2000 the National High Court sentenced the author to five years and eight months' imprisonment and a fine of 18 million pesetas for fraud and four months for misappropriation. The author was acquitted of a charge of forgery. With regard to the first offence, the author states that he was charged with having obtained joint venture partnerships free of charge. He claims that the High Court refused to admit as evidence either the statements of seven expert witnesses for the defence or the documents submitted by the author himself - none of which evidence, according to the author, may be reviewed in the higher court. With regard to the second offence, the author claims that the conviction was based on conflicting evidence, including in particular the testimony of three prosecution witnesses whose credibility could not be reviewed by the higher court.

2.3 The author submitted an appeal in cassation on 16 grounds in the Criminal Division of the Supreme Court, requesting it to review various points of fact relating to his conviction. Since no review of the facts of a case is possible in cassation, the author attempted to obtain reconsideration of the prosecution evidence underpinning the conviction indirectly, by invoking the presumption of innocence, but without success. In the course of the cassation proceedings, the Committee published its opinion in the *Gómez Vázquez* case, which prompted the author to petition the Supreme Court on three different occasions to apply the Committee's reasoning on the second hearing principle contained in article 14, paragraph 5, but his applications were rejected.

2.4 The General Workers Union (UGT), the plaintiff in the appeal in cassation, claimed before the Supreme Court that, with regard to the offence of misappropriation for which the author had been convicted as an accessory, the incriminating conduct should have been classed as the perpetration of an offence, not merely aiding and abetting. The author disputed that claim, notably in a letter to the Supreme Court dated 4 December 2000, which is in the file before the Committee. In a judgement dated 29 July 2002, the Supreme Court ruled on the appeal and increased the author's sentence for misappropriation from four months' to four years' imprisonment, holding that he had been more deeply involved in the offence, as a perpetrator and not merely an accessory. According to the author, the Supreme Court failed to address questions of fact owing to the restricted nature of cassation proceedings, and he was thus deprived of the right to a full review of his case.

2.5 On the day sentence was handed down, i.e. 29 July 2002, the author was taken to prison where he stayed until September the same year, when he was released on probation by reason of his age and infirmity.

2.6 The author is of the view that domestic remedies were exhausted with the judgement handed down by the Supreme Court. He admits that he has not submitted an application for *amparo* (enforcement of constitutional rights) to the Constitutional Court, maintaining that this option is pointless in the light of the Constitutional Court's consistently held position that an appeal in cassation complies with the requirement for a review established under article 14, paragraph 5, of the Covenant.

The complaint

3.1 The author alleges a violation of article 14, paragraph 5, of the Covenant, arguing that he was unable to secure a full review of the judgements handed down by the National High Court. Although the author sought to have the evidence underpinning his conviction re-examined, alleging a violation of his right to presumption of innocence, he says that, owing to the narrow scope of cassation proceedings, the Supreme Court's review of his case was confined to points of law only, thereby precluding a re-examination of issues of fact and a review of the evidence originally dismissed by the National High Court. He maintains that the Supreme Court's argument that it is unable to review the evidence as it was not present at the trial does not apply in his case, since the entire trial proceedings were recorded on videotape.

3.2 According to the author, the Supreme Court has consistently taken the position that the assessment of evidence adduced in the course of proceedings is not a matter for an appeal in cassation, save in exceptional cases characterized by extreme arbitrariness or manifest irrationality. Moreover, the author argues that in rulings handed down after the Committee had delivered its opinion in the *Gómez Vázquez* case, the Constitutional Court has held that article 14, paragraph 5, of the Covenant does not actually establish the principle of a second hearing, but merely stipulates that the judgement and sentence should be referred to a higher court, and that an appeal in cassation, notwithstanding the restricted scope of this remedy, is in keeping with the review and safeguard function required by the Covenant.

3.3 In support of his complaint, the author cites the Committee's concluding observations on the fourth periodic report of Spain, which recommend that the State party should institute a right of appeal against decisions of the National High Court in order to meet the requirements of article 14, paragraph 5, of the Covenant. He also cites the Committee's opinion in the *Gómez Vázquez* case, wherein it concluded that the lack of any possibility of fully reviewing the author's conviction and sentence, the review having been limited to the formal or legal aspects of the conviction, meant that the guarantees provided for in article 14, paragraph 5, of the Covenant had not been met.

3.4 The author alleges a second violation of article 14, paragraph 5, on the grounds that he was denied any kind of review in relation to the increased sentence imposed by the Supreme Court. The author claims that Spain, unlike other States parties, did not enter reservations to article 14, paragraph 5, to ensure that this provision would not apply to first-time convictions handed down by an appeal court. He adds that the settled practice of the Constitutional Court is that there is no right of appeal in respect of a sentence handed down by the court of cassation, so it was futile to submit an application for *amparo*.

Observations of the State party on admissibility

4.1 In its written submission of 17 April 2003, the State party maintains that the communication is inadmissible under article 5, paragraph 2 (b), of the Covenant because domestic remedies have not been exhausted. It holds that the author of the communication should have submitted an application for *amparo* to the Constitutional Court with respect to the Supreme Court's decision to reject his appeal in cassation, and that *amparo* proceedings cannot be considered an ineffective remedy in the specific case of the author.

4.2 In the view of the State party, the Constitutional Court should have had the opportunity to give its opinion, in *amparo* proceedings, on the scope of review in cassation in the present case. Since the author failed to apply for *amparo*, the Constitutional Court was denied that opportunity. According to the State party, the question of the exhaustion of domestic remedies must be considered in relation to each specific case. As far as the author is concerned, the State party claims that the review of his conviction in cassation was not limited to formal or legal aspects, but allowed for a complete review of the facts and the evidence on which the conviction had been based, as the Supreme Court judgement in the author's case actually states. As to the scope of review in cassation, the State party argues that judicial practice has evolved on the question of the scope of review in cassation, especially in respect of errors of fact and assessment of evidence. The State party claims that this point is addressed in the cassation judgement too. In the State party's view, therefore, the author should have submitted an application for *amparo* in order to allow the Constitutional Court to consider the scope of the review undertaken in his specific case.

4.3 The State party refers to the judgement handed down by the Supreme Court in the author's case, which reads: "As a perusal of this judgement will confirm, the various parties have had the opportunity to formulate more than 170 grounds for cassation, frequently invoking errors of fact in the assessment of evidence and the subsequent review of proven facts. The presumption of innocence is also invoked as grounds for challenging the rationality and logic applied in assessing the evidence. This implies that we are speaking of a remedy that goes beyond the strictly defined, formal limits of cassation in the conventional sense and satisfies the requirement of a second hearing."

4.4 The State party argues that a heavier penalty was imposed in full compliance with the accusatorial procedure and that the author was fully aware of the penalties associated with the charges; moreover, it was quite untrue to say that it was a first-time conviction for the author. In the State party's view, the fact that a number of States parties have made reservations to article 14, paragraph 5, of the Covenant, thereby excluding its application to cases in which a heavier sentence is handed down, does not imply that the provision itself precludes the imposition of a heavier sentence.

Author's comments

5.1 In his written submission of 25 July 2003, the author reiterates the futility of submitting an application for *amparo* to the Constitutional Court. He says that the settled practice of the Supreme Court and the Constitutional Court both before and after publication of the Committee's opinion in the *Gómez Vázquez* case has not changed with regard to cassation proceedings, in the sense that neither will review matters of fact in a given case. He indicates that the so-called evolution of judicial practice actually refers to a situation that has always existed, for the Supreme Court may examine the facts in cassation proceedings in cases characterized by extreme arbitrariness or manifest irrationality.

5.2 The author emphasizes that it is untrue that in cassation the Supreme Court undertook a complete review of the errors of fact in the judgement. He calls attention to the fact that the judgement handed down by the National High Court ignored evidence presented in his defence, and that this was not reviewed in cassation. According to the author, his communication is identical to the one on which the Committee ruled in the *Gómez Vázquez* case and should be dealt with in the same manner. He alleges that, while the State party claims the possibility of a remedy of *amparo* before the Constitutional Court, it also admits that if he were to exercise that remedy it would be dismissed, which he considers to be proof of its futility.

Decision of the Committee on admissibility

6. At its eightieth session, on 8 March 2004, the Committee found that domestic remedies had been exhausted in accordance with article 5, paragraph 2 (b), of the Optional Protocol and declared the communication admissible inasmuch as it raised issues relating to article 14, paragraph 5, of the Covenant.

Submissions of the State party on the merits

(a) Legislative amendment extending the remedy of appeal in Spain

7.1 The State party reports that Organic Law No. 19/2003, of 23 December 2003, instituted the right to a second hearing in Spain, empowering the Criminal Divisions of the High Courts of Justice to try appeals against rulings handed down by the provincial courts and providing for the creation of an Appeals Division in the National High Court. According to the preamble, the aim of this Act was, in addition to reducing the workload of the Second Division of the Supreme Court, to resolve the controversy that arose following publication of the Human Rights Committee's opinion of 20 July 2000, in which it found that Spain's current cassation procedure violated the Covenant. The State party further notes that the considerable extension of the scope of cassation had necessitated a legislative amendment to transfer responsibility from the Supreme Court and allow it to confine itself to standardizing the application of the law. The State party stresses that the law was amended not because the scope of cassation was not broad enough to meet the requirements of the Covenant but because, on the contrary, that scope had been broadened so far that it became necessary to address the problem of the Supreme Court's excessive caseload.

(b) Scope of cassation now considerably extended

7.2 The State party argues that the remedy of cassation is now considerably broader in scope than it used to be. The State party cites a Supreme Court judgement of 16 February 2004 which notes that, as originally conceived and as amended prior to the entry into force of the Spanish Constitution, the remedy of cassation was bound by a rigid formalism that precluded any review of the evidence save, in exceptional cases, on the basis of documentation providing incontrovertible proof of the error committed by the trial court. The State party maintains that the situation changed with the adoption of the new Constitution and the amendment of article 5.4 of the Judiciary (Organization) Act, which opened up ample opportunity for the review of evidence. The possibility of action for violation of the basic rights enjoyed by anyone accused of a criminal offence and, more fundamentally, the overriding right to an effective legal remedy and the presumption of innocence, as well as the requirement for an adequate account of the considerations and logic that led the court to hand down a given judgement, are a sufficient basis for asserting that the remedy can be effective.

7.3 The State party further argues that neither in Spain's legal order nor in those of its neighbours do remedies of appeal imply a resubmission of the evidence. In the author's case, the Supreme Court stressed that there is no remedy of appeal that allows a full repetition of the lower court proceedings. Under article 795 of the Criminal Procedure Act, which provides that judgements handed down by the criminal courts may be appealed in the provincial court or the National High Court, the grounds for application are restricted to breaches of procedural rules and safeguards, errors in the evaluation of the evidence and violations of the Constitution or the law. Application may be made only for examination of evidence that the lower court was unable to examine, or of evidence that was rejected without just cause, or of evidence that was admitted but not examined, for reasons not attributable to the appellant, and provided the right to a defence was violated. The State party goes on to list various European countries whose legislation, in its view, also precludes from appeals any repetition of the trial with a full resubmission of the evidence.

7.4 The State party points out that, in the author's case, the Supreme Court deliberated at great length over whether the remedy of cassation includes a right to review of the judgement and the sentence. According to the State party, the judgement draws attention to the remarkable breadth of the review of proven facts, stating: "It is true that the 9 November 1993 judgement (in the *Gómez Vázquez* case) held that such evidence has to be evaluated exclusively by the lower court in accordance with the provisions of article 741 of the Criminal Procedure Act, and that a re-evaluation of the evidence would change the nature of the remedy of cassation and turn it into a second hearing; however, that does not alter the fact that the remedy of cassation has lost its procedural rigidity and formalism and now provides numerous opportunities for review, including review of the provincial courts' assessment of evidence."

7.5 Thus the judgement cited by the State party shows that the old rules under which evidence already examined could not be re-examined have been superseded. Rational evaluation of the evidence, action in respect of presumption of innocence, the requirement for reasoned court rulings and the rejection under the Constitution of any suggestion of arbitrary action by the public authorities, all entail the possibility, through the cassation process, of reviewing and assessing evidence. The Supreme Court has established in its case law not only that the cassation process includes an assessment of the legality or illegality of the evidence submitted, but also that the review includes substantive examination of the evidence to determine whether it is incriminatory or exculpatory, or simply too flimsy to set aside the presumption of innocence. The maxim *in dubio pro reo*, a principle of interpretation long considered not to apply in cassation proceedings, is now one of the principles applied in assessing evidence and may be reviewed in cassation in the course of the review of the evidence. The State party stresses that due account must be taken of this indisputable development in the remedy of cassation in Spain, to the point where it now allows a detailed and extensive scrutiny of facts that were deemed proven in the lower court. In support of its arguments, the State party also cites a judgement of the European Court of Human Rights dated 19 February 2002, which, in ruling on a complaint by a Spanish national concerning the alleged lack of a right to a second hearing, found that the Spanish cassation process was compatible with articles 6, paragraph 1, and 13 of the European Convention on Human Rights.[1]

(c) Scope of the review in the author's case

7.6 The State party argues that it is necessary to examine the circumstances surrounding the review in cassation carried out specifically in the author's case. In the State party's view, unlike what happened in the *Gómez Vázquez* case, the Supreme Court reviewed matters of fact and of evidence on the eight occasions on which the author invoked factual errors in the evaluation of the evidence or violations of the presumption of innocence. In this regard, the State party cites the Supreme Court's own ruling on the author's case, stating that the formulation by the parties of more than 170 grounds for cassation, and their frequent invocation of errors in the assessment of evidence and the presumption of innocence, led it to conclude that in the author's case the right to a second hearing had been exercised. Lastly, the State party asserts that, whatever the merits of the appeal system within the Spanish legal order, it is clear that in this specific case there was a wide-ranging review of the facts and the author's conviction and sentence were submitted in their entirety to a higher court, in full compliance with the requirements of the Covenant.

(d) Increased sentence not a violation of the Covenant

7.7 The State party argues that it is not only the convicted person but also the accusers, including those harmed by the offences being tried, who have the right to appeal and request a review of a conviction, and that this in no way impairs the convicted person's right to a defence, since he is aware of the charges and may advance whatever arguments he sees fit. The State party adds that any increase in the sentence is passed with every regard for the accusatory principle and in respect of crimes and penalties not exceeding those called for by the charges and of which the accused has been aware since the opening of the trial and naturally remains aware as the remedy proceeds. The rights to information and to a defence enjoyed by the accused in the lower court are not forfeit during cassation. Nor is there any material change in the accused's circumstances, since the penalties sought in the charges still stand. In this sense, the State party argues, remedies constitute a continuation of the trial. Furthermore, it is not true that the author was convicted for the first time in cassation. The possibility of increasing the sentence upon review and within the terms of the charges and the remedies sought is characteristic of all the sophisticated legal orders to be found in Spain's neighbours. Anything else would be a denial of the accuser's right to a remedy, which it cannot be claimed is required under article 14, paragraph 5, of the Covenant. The reservations to article 14, paragraph 5, entered by certain States parties in no way imply that that provision precludes an increase in the sentence when a remedy is sought by the accusers; the intention appears to be rather to forestall any interpretation of article 14, paragraph 5, along the lines of the author's reading thereof: in other words the aim is to ensure the applicability of that provision, not to preclude it.

Author's comments on the State party's submissions on the merits

(a) Amendment to Organic Law No. 19/2003

8.1 In his submission dated 15 November 2004, the author states that this law is not immediately applicable and is not yet in force as the regulations required for its effective implementation have not been enacted. Furthermore, the amendment has no retroactive effect, which means the author's situation of having been deprived of the right to a second hearing remains unchanged, since the law provides no remedy for cases that have already been judged. The author claims that the *ratio legis* of the amendment is not, as the State party maintains, extension of the scope of cassation, but rather, as indicated in the preamble to the Act, settlement of the controversy arising out of the Committee's Views on the *Gómez Vázquez* case.

(b) Alleged extension of the scope of cassation

8.2 The author claims that the State party has disregarded the Committee's Views in the *Gómez Vázquez*, *Sineiro* and *Semey* cases, in which it found against the State party for the inadequacy of its reviews of criminal judgements. The Committee's task is to consider a specific case and not, as the State party claims, to give an opinion on the overall human rights situation in the country in question, which is more a matter for the periodic report procedure. The Supreme Court judgement of 16 February 2004 refers to the *Sineiro Fernández* case in rejecting an appeal in cassation, but disregards the Committee's Views on the communication submitted by Mr. Sineiro. The Constitutional Court resorted to reasoning the author finds less than convincing: "... it is quite impossible, for reasons both temporal and metaphysical, to faithfully reproduce all that occurred in the trial court. The system complies with the provisions of the Covenant if … it re-evaluates the interpretation of the evidence made by the trial court and reviews the rationality and deductive logic required by any judicial weighing of evidence ... One cannot stop time. Not even a video recording of the trial would suffice, for these are images of the past and show us only the scene, not the direct, uncommunicable experiences of those involved". In respect of the competence of the Supreme Court, says the author, the Constitutional Court states in the same judgement that "... a reassessment of the evidence upon which the trial court based its decision to convict is not one of its functions". The author adds that, under the Code of Criminal Procedure, article 884, any challenge to the facts deemed proven in the judgement is a ground for dismissal of an application; and, under article 849, an appeal in cassation may be lodged only on the basis of an error in the evaluation of the evidence, where said error is substantiated by documentary proof which is attached to the file, demonstrates the error of the court, and is not contradicted by other evidence.

(c) Scope of the review in the author's case

8.3 The author claims that the remedy of cassation does not permit any challenge to the credibility of the witness or expert testimony upon which the sentence was based except in cases of manifest arbitrariness or a complete absence of evidence for the prosecution. On the count of fraud, the National High Court judgement found that the author had obtained joint venture partnerships free of charge; this the author denied, stating that what he had received were professional fees in payment for his services as a lawyer. A number of expert witnesses supported the author's version, but it was not accepted by the court; nor did the court admit the documentary evidence submitted by the author in his defence. No review of these points is possible in cassation, says the author. On the count of misappropriation, the National High Court based its ruling on conflicting statements of which the court accepted only those which told against the innocence of the accused, referring explicitly to three prosecution witnesses, whose credibility cannot be reviewed in cassation. The Supreme Court does not deny that it did not review the evidence in this regard, but claims that in reviewing the rationality of the court's consideration of the evidence it has complied with article 14, paragraph 5, of the Covenant. The prosecutor attached to the Supreme Court, on the other hand, recognized that the Supreme Court was not competent to assess the evidence. The author points out that the State party's reference to a judgement of the European Court of Human Rights disregards the fact that the right to a second hearing is not recognized in the European Convention on Human Rights but in Protocol No. 7 to that Convention, to which Spain is not a party. He further points out that the Inter-American Court of Human Rights, for its part, in a judgement handed down on 2 July 2004 in the case of *Herrera Ulloa v. Costa Rica*, took into account the Committee's decisions in the cases previously referred to and found that Costa Rica's system of cassation did not comply with the provisions of article 8 of the American Convention on Human Rights because the higher court may not "conduct a complete and thorough review of all the matters discussed and considered by the lower court".[2]

(d) No right to a second hearing on the increased sentence imposed in cassation

8.4 The author claims that those States parties that wish to preclude application of article 14, paragraph 5, of the Covenant in cases where a sentence is increased by the higher court have entered a specific reservation to that effect. The author cites the reservation entered by Austria in that regard. He adds that the State party could make certain simple changes to the law to ensure that a division of the Supreme Court could carry out a full review of a penalty imposed or increased on appeal. He points out that Spain's Judiciary (Organization) Act provides a review mechanism for similar cases, such as judgements handed down by the Administrative Division of the Supreme Court.

Issues and proceedings before the Committee

Consideration of the merits

9.1 The Human Rights Committee has considered the present communication in the light of all the information made available by the parties, as provided in article 5, paragraph 1, of the Optional Protocol.

9.2 In a previous case (communication No. 1095/2002, *Gomariz v. Spain*, Views of 22 July 2005, para. 7.1) the Committee held that the absence of a right of review by a higher court of a conviction imposed by an appeal court following acquittal by a lower court constituted a violation of article 14, paragraph 5, of the Covenant. The present case is different in that the conviction by the lower court was confirmed by the Supreme Court. That court, however, increased the penalty imposed by the lower court in respect of the same offence. The Committee notes that in the legal systems of many countries appeal courts may lower, confirm or increase the penalties imposed by the lower courts. Although the Supreme Court in the present case took a different view of the facts found by the lower court, in that it concluded that the author was a principal, and not merely an accessory, in relation to the misappropriation offence, in the Committee's view the finding of the Supreme Court did not change the essential characterization of the offence but merely reflected the Supreme Court's assessment that the seriousness of the circumstances of the offence merited a higher penalty. Thus there is no basis for a finding of violation in this case of article 14, paragraph 5, of the Covenant.

9.3 As to the author's remaining claims under article 14, paragraph 5, of the Covenant, the Committee notes that several of the grounds for cassation submitted by the author to the Supreme Court referred to alleged errors of fact in the evaluation of the evidence and violation of the principle of presumption of innocence. It is clear from the judgement that the Supreme Court looked at the author's allegations in great detail and considered the evidence submitted in the trial and referred to by the author in his appeal, and found that there was sufficient incriminating evidence to rule out errors in weighing the evidence and set aside the presumption of innocence in the author's case.[3] The Committee finds that this part of the complaint of a violation of article 14, paragraph 5, is not duly substantiated by the author.

10. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts before it do not disclose a violation of article 14, paragraph 5, of the Covenant.

[Adopted in English, French and Spanish, the Spanish text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the Committee's annual report to the General Assembly.]

Notes

[1] European Court of Human Rights, case No. 65892/01, *Ramos Ruiz v. Spain*, decision adopted on 19 February 2002.

[2] Inter-American Court of Human Rights, *Herrera Ulloa v. Costa Rica*, judgement of 2 July 2004, series C, No. 107, paras. 166-167.

[3] For similar cases, see communication No. 1059/2002, *Carvallo v. Spain*, decision of 28 October 2005; communication No. 1399/2005, *Cuartero v. Spain*, decision of 25 July 2005, para. 4.4; communication No. 1356/2005, *Parra Corral v. Spain*, decision of 29 March 2005, para. 4.3; communication No. 1389/2005, *Bertelli v. Spain*, decision of 25 July 2005, para. 4.5.

DD. Communication No. 1157/2003, *Coleman v. Australia*

(Views adopted on 17 July 2006, eighty-seventh session)*

Submitted by: Patrick Coleman (not represented by counsel)

Alleged victims: The author

State party: Australia

Date of communication: 14 January 2003 (initial submission)

Subject matter: Conviction and sentence for expression of political speech in pedestrian mall without permit necessary under council bylaw

Procedural issues: Admissibility *ratione personae* - sufficient quality of victim - substantiation, for purposes of admissibility - admissibility *ratione materiae*

Substantive issues: Freedom of expression - permissible limitations

Articles of the Optional Protocol: 1 and 2

Articles of the Covenant: 9, paragraphs 1 and 5, 15, paragraph 1, 19 and 21

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 17 July 2006,

Having concluded its consideration of communication No. 1157/2003, submitted to the Human Rights Committee by Patrick Coleman under the Optional Protocol to the International Covenant on Civil and Political Rights,

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* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Nisuke Ando, Mr. Prafullachandra Natwarlal Bhagwati, Mr. Alfredo Castillero Hoyos, Ms. Christine Chanet, Mr. Maurice Glèlè Ahanhanzo, Mr. Edwin Johnson, Mr. Walter Kälin, Mr. Ahmed Tawfik Khalil, Mr. Michael O'Flaherty, Ms. Elisabeth Palm, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Hipólito Solari-Yrigoyen, Ms. Ruth Wedgwood and Mr. Roman Wieruszewski.

Pursuant to rule 90 of the Committee's rules of procedure, Committee member Mr. Ivan Shearer did not participate in the adoption of the present decision.

The text of an individual opinion signed by Committee members Mr. Nisuke Ando, Mr. Michael O'Flaherty and Mr Walter Kälin is appended to the present document.

Having taken into account all written information made available to it by the author of the communication and the State party,

Adopts the following:

Views under article 5, paragraph 4, of the Optional Protocol

1. The author of the communication, dated 14 January 2003, is Patrick John Coleman, an Australian national born on 22 November 1972. He claims to be victim of violations by Australia of article 9, paragraphs 1 and 5; article 15, paragraph 1; article 19 and article 21 of the Covenant. He is not represented by counsel.

Factual background

2.1 On 20 December 1998, the author delivered a public address at the Flinders Pedestrian Mall, Townsville, Queensland, without a permit. Standing on the edge of a water fountain in the mall with a large flag with a pole over his shoulder and then moving on to a concrete table close to the fountain, he loudly spoke for some 15 to 20 minutes on a range of subjects including bills of rights, freedom of speech and mining and land rights. On 23 December 1998, he was charged under section 8 (2) (e) of *Townsville City Council Local Law No. 39* ("the bylaw"), for taking part in a public address in a pedestrian mall without a permit in writing from the town council.[1] On 3 March 1999, the author was convicted in the Townsville Magistrates Court for delivery of an unlawful address and fined $300, with 10 days imprisonment on default, plus costs.

2.2 On 7 June 1999, the Queensland District Court dismissed the author's appeal against conviction, rejecting the argument that, although acting alone, the author was protected by section 5 (1) of the *Peaceful Assemblies* Act 1992 (Queensland).[2] On 29 August 1999, he again delivered a speech at the same pedestrian mall. He was arrested pursuant to a warrant for non-payment of the original fine within a three month period and held in police custody for five days. For sitting on the ground and refusing voluntarily to accompany the police, he was charged with obstructing police under section 120 (1) of the *Police Powers and Responsibilities* Act 1997 (Queensland). On 2 September 1999, the author was transferred to Townsville Correctional Centre. The Centre's General Manager exercised his delegated authority under section 81 of the Corrective Services Act 1988 to approve five days early discharge for the author, which resulted in release the same day.

2.3 On 6 December 1999, the author was convicted and fined $400, with 14 days imprisonment on default, for obstruction of police. On 21 November 2000, the Queensland Court of Appeal, by a majority, dismissed his appeal against the original conviction under the bylaw, overturning the costs order. Assisted by legal aid, the author argued that the bylaw's prohibition amounted to an unconstitutional limitation of freedom of speech on political issues. The court's majority considered that the purpose of the bylaw served the legitimate end of preserving users of the small area of the pedestrian mall from being harangued by public addresses. The bylaw was also reasonably appropriate and adapted to serve that end as it covered "a very limited area, leaving plenty of opportunity for making such addresses in other suitable places". On 26 June 2002, the High Court in turn denied the author's further application for special leave to appeal.

The complaint

3.1 The author argues that his conviction and sentence for breach of the bylaw amounts to violations of articles 9, paragraphs 1 and 5, 15, paragraph 1, 19 and 21 of the Covenant. As to article 9, paragraph 1, he argues that the procedure for procuring a permit is arbitrary and entirely within official discretion. No procedure is set out and no grounds need to be provided for a decision. A denial of a permit is not limited to the grounds set out in article 19, paragraph 3. A permit may be revoked at any time. Similarly, the absence of criteria for a decision mean that the procedure cannot be considered "prescribed by law" under article 9, paragraph 1. The author also claims compensation under article 9, paragraph 5, on the basis of his allegedly unlawful detention. On article 15, he claims that he was found guilty even though had he conducted himself in the way he had with another person accompanying him, he would have been protected by section 5 (1) of the *Peaceful Assemblies* Act 1992.

3.2 On article 19, the author asserts that, during his prosecution, no evidence was provided by the City Council that prosecution was necessary for any of the reasons set out in article 19, paragraph 3. He argues that he had a right to impart oral information, that he conducted himself in peaceful and orderly fashion and that he was not stopped by police present, who simply videotaped him. There were thus no permissible grounds of limitation in article 19, paragraph 3, that would apply. A permit cannot be required as a precondition for the exercise of this right. As to article 21, the author argues that he had a right to assemble with fellow citizens in a public area, whom he addressed in his speech. He cites in support the Committee's Views in *Kivenmaa v. Finland*,[3] where the Committee found in favour of a group of individuals who had hoisted a banner criticising a visiting head of State.

The State party's submissions on admissibility and merits and author's comments

4.1 By submission of 21 May 2004, the State party disputed both the admissibility and merits of the communication. Firstly, the State party argues the communication is inadmissible *ratione personae* insofar as it is directed against Sergeant Nicolas Selleres of the Queensland police, the Townsville City Council and the State of Queensland, these parties not being States parties to the Covenant. Secondly, in relation to the claims under articles 9, paragraph 5, and 15, the State party argues the author is not sufficiently personally affected to qualify as a victim, for admissibility purposes. On article 9, paragraph 5, he makes no reference to any act or omission of the State party, making no reference to any existence of lack of an enforceable right or remedy. Rather, he simply claims compensation as a remedy. In relation to article 15, the State party contends that the author's argument that if he had read out his speech with another person, the speech would have been protected under the *Peaceful Assembly* Act 1992, is irrelevant. The criminal offence with which the author was charged was an offence at the time of commission, and no question of retrospectivity arises.

4.2 Thirdly, the State party argues that the claims are insufficiently substantiated, for purposes of admissibility and/or inadmissible *ratione materiae*, comprising simply a series of assertions. In addition to the arguments already set out, the State party adds, on article 9, paragraph 1, that the author makes arguments solely in relation to the procedure for granting a permit, rather than in relation to his arrest and detention. On the claim under article 19, the author's contention that the City Council did not advance any reasons during the prosecution showing its necessity, in terms of article 19, goes simply to the trial conduct. This failure does not itself demonstrate that the bylaw failed to satisfy the requirements of article 19. As to the claim article 21, the State party argues that there was no assembly in the present case; the Magistrates Court finding, and as confirmed on appeal, that nobody stood and listened to what the author was saying, so as to constitute a gathering. The fact that other people were passing through the mall is not sufficient to constitute an assembly.

4.3 On the merits, the State party submits that the complaint, in relation to article 9, has insufficient evidentiary foundation to enable proper consideration of the merits and in any event has not been violated. An assertion that the permit procedure was arbitrary has no impact on the arrest of a person in accordance with the sentence imposed for breach of the bylaw. The author did not show that his detention was marked by capriciousness, unreasonableness and lack of proportionality so as to bring it within the scope of the article. The arrest was made, pursuant to a judicial warrant, in accordance with normal police procedure applicable to fine defaulters. The fine and default sanction of imprisonment was imposed by the Magistrates Court after the author specifically rejected a community service option or good behaviour bond. The District Court, on appeal, considered the sentence appropriate. Moreover, the author was released after serving half his sentence.

4.4 On article 9, paragraph 5, the author makes no allegations that reveal a violation of the right to claim compensation before a domestic authority for unlawful arrest. As to article 15, the State party also contends that the claim has insufficient evidentiary foundation to enable proper consideration of the merits and in any event has not been violated. The author argues that if circumstances had been different, he would not have been convicted under the bylaw. This does not address any act or omission of the State, nor does it suggest that the crime of delivering an unlawful address was not an offence when it was committed.

4.5 On article 19, the State party also contends that the claim has insufficient evidentiary foundation to enable proper consideration of the merits and in any event has not been violated. The State party argues that the restriction on speech is plainly provided for by law in the form of the bylaw. The town council adopted a policy in relation to the mall in question in April 1983, approving use of the mall for public forums and being designed to maximise the use of the mall for public benefit without unduly affecting public enjoyment of the area. The permit system allows the council to consider whether a proposal is likely to impact on the public amenity enjoyed by small number of users (such as undue noise, crowding, impact on commercial activity or safety hazards). The restrictions in place were aimed at orderly use of the mall by the public as a whole. In any event, the State party notes that the permit system is not required for the use of booths or meetings, as exempted in section 8 (1) of the bylaw (see footnote 1). Thus, there is no a blanket restriction on the right to freedom of expression.

4.6 As to article 21, the State party argues that "assembly" necessarily requires that more than one person gathers. It invokes academic commentary to the effect that "only intentional, temporary gatherings of several persons for a specific purpose are afforded protection of freedom of assembly".[4] In the State party's view, the author's address did not satisfy this requirement. The Magistrates Court considered that there was no "company of persons gathered together for the same purpose", finding it "quite obvious" that "there was absolutely no assembly or gathering of persons at any stage". The District Court, on appeal, agreed the author was "acting alone". The Court of Appeal, in turn, confirmed that members of a speaker's audience, passively listening, cannot be considered to be taking part in it.

Author's comments on the State party's submissions

5.1 By letter of 18 June 2004, the author responded, disputing the State party's submissions. As to admissibility *ratione personae*, the author confirms that he regards Australia as the State party responsible for the acts of subordinate officers and governments, also invoking article 50 of the Covenant. He notes that following the events for which he was convicted, following public interventions, the town council decided to erect and has erected a "speaker's stone" in the mall. He also notes that the town council and police sought to recover substantial costs incurred in the proceedings, failure of payment of which would lead to bankruptcy proceedings against him. He notes that bankruptcy would also result in his loss of political rights to run for elected office which he currently enjoys.

5.2 As to his individual claims, the author argues, under article 9, paragraph 5, that he unsuccessfully pursued all available domestic remedies against his conviction and thus no compensation can be procured in Australia; rather, he would be regarded as a vexatious litigant. He thus asks the Committee to order compensation for the violations suffered. Under article 15 and 19, he argues that as under international law he was permitted to engage in the peaceful conduct he did, his conviction was not properly grounded in law, as required by article 15.

5.3 By letter of 27 July 2004, the author provided a sequestration order of the Federal Court, sequestering his estate subsequent to the author's bankruptcy.

Issues and proceedings before the Committee

Consideration of admissibility

6.1 Before considering any claims contained in a communication, the Human Rights Committee must, in accordance with article 93 of its rules of procedure, decide whether or not it is admissible under the Optional Protocol to the Covenant.

6.2 On the State party's objection to the communication's admissibility *ratione personae*, the Committee notes that, both on ordinary rules of State responsibility and in light of article 50 of the Covenant, the acts and omissions of constituent political units and their officers are imputable to the State. The acts complained of are thus appropriately imputed *ratione personae* to the State party, Australia.

6.3 On the claim under article 9, paragraph 5, the Committee notes that the author seeks compensation for the underlying alleged violations of articles 15, 19 and 21 of the Covenant, rather than in respect of a failure of the national authorities to provide compensation for his arrest for failing to pay the initial fine imposed by a court by way of sentence. This separate claim under article 9, paragraph 5, is therefore insufficiently substantiated, for purposes of admissibility, and is thus inadmissible under article 2 of the Optional Protocol.

6.4 As to the author's claim under article 15, the Committee notes that the offence for which the author was convicted was a criminal offence at the time of the conduct in question, and thus this claim is also inadmissible under article 2 for insufficient substantiation. As to the claim under article 21, the Committee observes that the author was, on the evidence found by the domestic courts, acting alone. In the Committee's view, the author has not advanced sufficient elements to show that an "assembly", within the meaning of article 21 of the Covenant, in fact existed. This claim is, accordingly, also inadmissible for insufficient substantiation, under article 2 of the Optional Protocol.

6.5 In the Committee's view, the author has sufficiently substantiated, for purposes of admissibility, the claims under articles 9, paragraph 1, and 19, and proceeds to its examination on the merits.

Consideration of the merits

7.1 The Human Rights Committee has considered the present communication in the light of all the information made available to it by the parties, as provided in article 5, paragraph 1 of the Optional Protocol.

7.2 The Committee notes that the author's arrest, conviction and sentence undoubtedly amounted to a restriction on his freedom of expression, protected by article 19, paragraph 2, of the Covenant. The basis for restriction, set out in the bylaw, was prescribed by law, which leads to the question of whether the restriction was necessary for one of the purposes set out in article 19, paragraph 3, of the Covenant, including respect of the rights and reputations of others or public order (*ordre public*).

7.3 The Committee notes that it is for the State party to show that the restriction on the author's freedom of speech was necessary in the present case. Even if a State party may introduce a permit system aiming to strike a balance between an individual's freedom of speech and the general interest in maintaining public order in a certain area, such a system must not operate in a way that is incompatible with article 19 of the Covenant. In the present case, the author made a public address on issues of public interest. On the evidence of the material before the Committee, there was no suggestion that the author's address was either threatening, unduly disruptive or otherwise likely to jeopardise public order in the mall; indeed, police officers present, rather than seeking to curtail the author's address, allowed him to proceed while videotaping him. The author delivered his speech without a permit. For this, he was fined and, when he failed to pay the fine, he was held in custody for five days. The Committee considers that the State party's reaction in response to the author's conduct was disproportionate and amounted to a restriction of the author's freedom of speech which was not compatible with article 19, paragraph 3, of the Covenant. It follows that there was a violation of article 19, paragraph 2, of the Covenant.

7.4 In view of this finding under article 19, paragraph 2, of the Covenant, the Committee need not separately address the author's claim under article 9, paragraph 1.

8. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts as found by the Committee reveal violations by Australia of article 19, paragraph 2, of the Covenant.

9. In accordance with article 2, paragraph 3 (a), of the Covenant, the State party is under an obligation to provide the author with an effective remedy, including quashing of his conviction, restitution of any fine paid by the author pursuant to his conviction, as well as restitution of court expenses paid by him, and compensation for the detention suffered as a result of the violation of his Covenant right.

10. Bearing in mind that, by becoming a party to the Optional Protocol, the State party has recognized the competence of the Committee to determine whether there has been a violation of the Covenant or not and that, pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the Covenant, and to provide an effective and enforceable remedy in case a violation has been established, the Committee wishes to receive from the State party, within 90 days, information about the measures taken to give effect to the Committee's Views. The State party is also requested to publish the Committee's Views.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the Committee's annual report to the General Assembly.]

Notes

[1] Section 8 of the bylaw provided at the material time as follows:

> "(1) This bylaw does not apply to the setting up and use of booths for religious, charitable, educational or political purposes or of a booth to be used at or near a polling place for, or for a meeting in connection with, an election in respect of either House of the Commonwealth Parliament, the Legislative Assembly or a Local Authority.
>
> (2) No person shall - (e) take part in any public demonstration or any public address.
>
> (3) A person who desires to obtain a permit for the purposes of this bylaw shall make application in writing therefore in the prescribed form. The application shall be lodged with the Council [which may grant a permit, with or without conditions, or refuse it] …"

[2] Section 5 (1) provides "A person has the right to assemble peacefully with others in a public place."

[3] Case No. 412/1990, Views adopted on 10 June 1994.

[4] Nowak, M.: *CCPR Commentary* (1st edition, NP Engel, Kehl), at 374.

APPENDIX

Concurring opinion of Committee members Mr. Nisuke Ando, Mr. Michael O'Flaherty and Mr. Walter Kälin

While we concur in the result that the Committee has reached in this case, we reach that conclusion for different reasons than those employed by the majority. In our view, it is important to note the existence of a permit system in this case, which enables the State party's authorities to strike a balance, consistent with the Covenant, between freedom of expression and countervailing interests. The author, however, in declining to seek a permit, accordingly deprived the State party's authorities of the opportunity to reconcile the interests at issue in this particular case. We regret that the Committee has not weighed this aspect of the case in its reasoning. We would note, in addition, that the decision should not be read as a rejection of permit systems that are in place in many States parties to strike appropriate balances not only in the area of freedom of expression, but in other areas such as freedom of association and assembly. On the contrary, the establishment of such systems, in principle, is wholly consistent with the Covenant, and has additional advantages of fostering clarity, certainty and consistency, as well as providing an easier means of review by the local courts and in turn the Committee of a decision by the authorities to decline a particular exercise of the right, rather than being left, as in this case, with an assessment of the raw primary facts standing alone. It is of course clear that such a permit system must allow for full enjoyment of the right in question, and be administered consistently, impartially and sufficiently promptly.

In this case, however, on the basis of the posture of the case as it is before the Committee, we would emphasise the following elements. The author's arrest, fine and imprisonment for failure to pay the fine are, in combination, the State party's response to the conduct engaged in by the author - in sum, these actions are a considerable infringement of the author's right to freedom of expression which must be justified in the light of the requirements of article 19 of the Covenant. In our view, the totality of the State party's action lies in such disproportion to the author's original underlying conduct that we are not satisfied that the State party has shown the necessity of these restrictions on the author's expression. The reasons advanced by the State party for the restriction, while wholly legitimate, are not in themselves sufficient to show their necessity in each case. It is the absence of the demonstration of the necessity in the present circumstances for the substantially punitive reaction of the State party to the author's conduct that accordingly leads us to agree with the Committee's eventual conclusion.

(*Signed*): Nisuke Ando

(*Signed*): Walter Kälin

(*Signed*): Michael O'Flaherty

[Done in English, French and Spanish, the English text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the Committee's annual report to the General Assembly.]

EE. Communication No. 1158/2003, *Blaga v. Romania* (Views adopted on 30 March 2006, eighty-sixth session)*

Submitted by:	Mr. Aurel Blaga and Mrs. Lucia Blaga (represented by counsel)
Alleged victim:	The authors
State party:	Romania
Date of communication:	16 July 2002 (initial submission)
Subject matter:	Equality before the law
Procedural issues:	Exhaustion of domestic remedies, admissibility *ratione temporis*
Substantive issues:	Extraordinary appeal of final court judgement
Articles of the Covenant:	12, 14 (1), 26
Articles of the Optional Protocol:	3, 5 (2) (b)

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 30 March 2006,

Having concluded its consideration of communication No. 1158/2003, submitted to the Human Rights Committee on behalf of Mr. Aurel Blaga and Mrs. Lucia Blaga the Optional Protocol to the International Covenant on Civil and Political Rights,

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* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Nisuke Ando, Mr. Prafullachandra Natwarlal Bhagwati, Ms. Christine Chanet, Mr. Maurice Glèlè Ahanhanzo, Mr. Edwin Johnson, Mr. Walter Kälin, Mr. Ahmed Tawfik Khalil, Mr. Rajsoomer Lallah, Mr. Michael O'Flaherty, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Ivan Shearer, Mr. Hipólito Solari-Yrigoyen and Mr. Roman Wieruszewski.

Having taken into account all written information made available to it by the authors of the communication and the State party,

Adopts the following:

Views under article 5, paragraph 4, of the Optional Protocol

1. The authors of the communication, dated 16 July 2002, are Aurel and Lucia Blaga, Romanian nationals born on 3 November 1930 and 2 December 1932, respectively, and residing in Bucharest. They claim to be victims of violations by Romania of articles 12, 14 and 26 of the Covenant. They are represented by counsel. The Covenant and the Optional Protocol, respectively, entered into force for Romania on 23 March 1976 and on 20 October 1993.

Factual background

2.1 In 1979, the authors acquired an apartment in Bucharest. In July 1988, they left Romania and settled abroad. As the authors did not return to Romania prior to expiry of their exit visa, the Bucharest municipality expropriated their property pursuant to its Resolution 1434/1989. The resolution was based upon Decree 223/1974, which provided that the State would gain ownership over buildings that belonged to persons who had left the country or had stayed abroad without permission. After the fall of the communist regime, Decree 223/1974 was repealed by the Statutory Order 9/1989, while property already transferred to the State remained unaffected.

2.2 On 27 May 1992, the authors applied to the Bucharest district court, seeking to quash Resolution 1434 and to order restitution of their property. On 8 July 1992 the court rejected their application and on 17 November 1992 their appeal was rejected by the Bucharest city court. On 24 January 1994, however, the Court of Appeal of Bucharest decided to order restitution of the authors' property because the expropriation ran counter to article 13 of the Universal Declaration of Human Rights on freedom of movement, and constituted "abusive regulation" rather than being for "public utility". No appeal was possible from this judgement. As a result, the Bucharest municipality entered a restitution order in the authors' favour. The authors state that on 22 May 1995 they concluded a contract with a third party for the sale of the apartment.

2.3 Following a decision by the Supreme Court in 1995 that the courts were not competent to rule on actions for recovery of expropriated buildings, the Procurator General filed appeals in the interest of law in a number of cases previously decided by the courts, including the authors' case. On 8 May 1996, the Supreme Court quashed the Court of Appeal's decision in the authors' case, holding it had exceeded its judicial competence and violated the principle of separation of powers.

2.4 As a result of this decision, the State sold the property to tenants pursuant to Act 112/1995. This statute provided that former owners of property could apply for restitution, and that if property was not restituted, it could be sold to State tenants. The authors state that they applied, pursuant to the same statute, for restitution of their property, but never received any reply to their application.

2.5 The authors state that the same matter has not been submitted for examination under any other procedure of international investigation or settlement. They argue that there is no possibility of appeal or review of the Supreme Court's decision. They add that the judgements of the Court of Appeal as well as the Supreme Court occurred after the entry into force of the Optional Protocol for the State party. In particular, the Supreme Court's decision "reconfirmed" and lent fresh legal force in 1996 to the expropriation decided pursuant to the 1974 decree, and thus all of the issues complained of fall within the Committee's competence.

The complaint

3.1 The authors argue that the Supreme Court's decision, which restored to legal effect the expropriation resolution in the authors' case, violated articles 12 and 26 of the Covenant. Their expropriation, without compensation or justification, was designed to punish the authors for leaving the country, and thus amounted to an arbitrary and discriminatory measure, also in breach of article 26. The authors point out that the abusive nature of the expropriation measure is explicitly recognized in the preamble of the 1989 legislation abrogating the 1974 decree.

3.2 The authors claim a violation of article 14, paragraph 1. They point out that before 2003 the Procurator General could at any moment decide to take exceptional action against what was otherwise an irrevocable legal decision,[1] thus creating great legal uncertainty and depriving the authors of the fruits of their litigation. In addition, the ability of the Procurator General, not being a party to the initial case, to make such an application is an unfair intrusion into litigation that upsets the equality of arms between the parties, contrary to article 14. The authors refer to a decision of the European Court of Human Rights holding this mechanism to be contrary to article 6, paragraph 1, of the European Convention.[2]

3.3 The authors argue that when they applied to the domestic courts for resolution of the issue in question, the courts were the only bodies with competent jurisdiction to decide on these matters, which were, and remain, rights and obligations of a civil character. The Supreme Court's decision that the courts were not competent to adjudicate these disputes thus violated their right of access to court, contrary to article 14, paragraph 1. The authors point out that the European Court reached identical conclusions, in terms of the European Convention, in the case cited above.

3.4 As a result of the foregoing, the authors request the Committee to find violations of articles 12, 14 and 26 of the Covenant, to recommend to the State party to annul the Supreme Court's decision, and to allow effective restitution of their property by allowing either entry into possession, or "real and fair" compensation.

The State party's submissions on the admissibility

4.1 By submission of 7 April 2003, the State party argues that the communication is inadmissible for failure to exhaust domestic remedies as well as, for the claims under articles 12 and 26, *ratione temporis*. As to the exhaustion of domestic remedies, the State party observes that by decisions on 28 September 1998 and 20 November 2000, the Supreme Court reversed its practice. It held, in a manner binding all lower courts, that the courts were indeed competent to try actions for recovery of property expropriated by the State pursuant to the 1974 decree.

Accordingly, it is open to the authors to file an action for recovery of property under article 480 of the Civil Code against the new owners of the property (being the former tenants of the apartment). The Court specifically recognized that such an action could plead inconsistency with an applicable international treaty as a ground for invalidity of the State's decision to expropriate.

4.2 The State party points out that the Supreme Court decision was not a judgement on the merits of the case, but rather determined, as a threshold question, that the courts did not have jurisdiction to rule on such issues. Accordingly, it cannot be said that the issues presented by the authors are *res judicata*, since the Supreme Court did not hand down a binding judgement on the merits of their case. In support, the State party refers to a 1954 decision of the (then) Supreme Tribunal to the effect that an adverse procedural decision is no bar to a new action addressing the merits of a case. The State party cites recent court decisions in cases identical to the authors', where this approach has been confirmed.

4.3 Under an action for recovery of property, the court analyses the competing titles of ownership to determine which party is "more characterized". Any person alleging a title can bring such an action. It is thus an effective, sufficient and available remedy, and failure to exhaust it renders the communication inadmissible.

4.4 The State party also points to a further measure in the form of Act 10/2001, which provides an administrative mechanism whereby property confiscated abusively under the former regime will either be redressed in kind, or by compensation of equivalent measure of value. Contracts by which the State disposed of the property are null and void, unless the buyer acted in good faith. The State party thus argues that even if an action for recovery of property was rejected, the administrative procedure would provide the possibility of equivalent compensation. The State party adds that the authors applied to the Bucharest municipality under this mechanism on 12 April 2001.

4.5 The State party requests the Committee to take notice of the fact that it has attempted to find various solutions for the redress of damage caused by the confiscations ordered by the communist regime.

4.6 On the *ratione temporis* issue, the State party refers to the Committee's jurisprudence that it does not have jurisdiction to consider allegations of violations occurring prior to the entry into force of the Optional Protocol for the State concerned, unless there is a continuing effect. The Committee has described the latter as "an affirmation, after the entry into force of the Optional Protocol, by act or by clear implication, of the previous violations of the State party".[3] Applying these principles, the State party observes that the 1974 decree was abrogated *ex nunc* (as to the future) by decree in 1989. *Ex tunc* (as to past effects), the courts are competent to rule on the legality of the acts in question when they occurred, and thus they are rendered devoid of any effects. As to article 12 issues, the State party's Constitution provided, at all relevant times since entry into force of the Optional Protocol for the State party, for full freedom of movement. Likewise, as to article 26, the State party points out that, contrary to the situation in other States, access to these remedies is non-discriminatory and not conditioned upon residence in, or citizenship of, the State party. As a result, the State party argues there are no continuing effects, and the claims under articles 12 and 26 are inadmissible *ratione temporis*.

Authors' comments on the State party's submissions

5.1 By letter of 6 May 2003, the authors reject the State party's reasoning on the admissibility of the communication, arguing that the fundamental issue is not whether they could bring a new action for recovery of property, but rather whether there is a remedy against the Supreme Court's decision in 1996 against which no further action lies. In any event, it would be "excessive" and contrary to the spirit of articles 2 and 5, paragraph 2, of the Optional Protocol for the authors to be required to institute fresh proceedings. Even if a further action were to be successful, the violations of their rights by the Supreme Court would not be extirpated. Further, while the State party proposes remedies for the recovery of property, the authors contend they are not addressing this issue (not being directly protected by the Covenant), but rather different issues arising under articles 12, 14 and 26. The State party has not shown how the remedies proposed would be adequate to remedy the violations of these rights suffered by them.

5.2 As to *ratione temporis* issues, the authors point out that, at a minimum, the article 14 claims are not affected by these arguments. However, in the authors' view, the Supreme Court's decision of 1996 represented a clear affirmation of the earlier expropriation, and thus itself constituted a violation of articles 12 and 26, sufficient to bring the claims within the Committee's jurisdiction. The authors point out that recent decisions of the State party's highest courts remain inconsistent as to the legal effect of expropriations carried out under the former regime. They further state that the administrative remedy under Act 10/2001 has been abolished by emergency ordinance No. 184/2002.

The Committee's admissibility decision

6.1 At its seventy-eighth session, the Committee considered the admissibility of the communication.

6.2 The Committee ascertained that the same matter was not being examined under another procedure of international investigation or settlement for the purposes of article 5, paragraph 2 (a), of the Optional Protocol.

6.3 As to the issue of exhaustion of domestic remedies, the Committee observed that, even assuming that the remedies proposed could offer full and effective satisfaction for the alleged violations, the authors first applied to the State party's courts in 1992 for a resolution of their claim. Given that the State party has apparently abrogated the administrative remedy which the authors had applied for in April 2001, the Committee would regard it as unreasonable to require the authors to pursue further judicial remedies, presently some eleven years after having first done so and litigating up to the highest judicial instance. The Committee was thus not precluded, under article 5, paragraph 2 (b), of the Optional Protocol, from considering the communication.

6.4 As to the arguments *ratione temporis* in respect of articles 12 and 26, the Committee observed that the effect of the Supreme Court's decision, in 1996, was that the expropriation of the authors' property remained legally valid. In the Committee's view, it could thus be argued that the decision confirmed and re-affirmed the validity of the earlier measures, bringing the claims within the competence of the Committee *ratione temporis*.

7. On 7 July 2003, the Human Rights Committee therefore decided that the communication was admissible.

State party's submission on the merits

8.1 On 5 January 2004 the State party reiterates that the authors' complaint refers to the non-restitution of confiscated property and is thus outside the scope of the Covenant. The State party moreover reiterates that effective remedies are available to the authors. The State party further objects to the authors' references to the jurisprudence of the European Court of Human Rights.

8.2 The State party further clarifies that the extraordinary appeal by the Procurator General was abolished in 2003 because it produced legal uncertainty. It further reiterates its objection *ratione temporis* to the authors' claims of a violation of articles 12 and 26 of the Covenant by the communist regime and states that the expropriation took place in July 1989, before the entry into force of the Optional Protocol for Romania. The State party explains that the administrative procedure allowing for compensation for expropriation was not repealed but will be applied through a special law which will establish criteria for establishing the value of the compensations.

8.3 With reference to the domestic legislation the State party asserts that the authors enjoy the right to freedom of movement. It further argues that the authors have not shown that they have been discriminated against during the process, and that all judgements have been rendered on the basis of existing evidence. The authors have at all times enjoyed access to justice, according to the procedural norms.

8.4 For the above reasons, the State party concludes that there has been no violation by Romania of articles 12, 14 and 26 of the Covenant.

Authors comments on the State party's submission

9.1 In their comments dated 3 February 2004 on the State party's submission, the authors observe that the State party is reiterating its arguments against the admissibility of the communication, without adducing any new elements. They claim that the acts of expropriation have continuing effects through the courts' decisions in their case, affirming the validity of the expropriation. As to the present status of the authors' apartment, it is said that the State has sold it to a third party at a very low price in December 1996 and that this sale was only possible because of the Supreme Court's 1996 decision.

9.2 On the merits, the authors argue that the expropriation of their property clearly was to punish them for not having returned to the country and thus in violation of the freedom of movement protected by article 12 of the Covenant, despite the fact that Romania at the time was already bound by the Covenant to which it became a party in 1976.

9.3 The authors moreover argue that since the measure of expropriation was taken only to punish those who had chosen to leave the country, it was also arbitrary and discriminatory, in violation of article 26, on ground of other status.

9.4 As far as article 14 of the Covenant is concerned, the authors argue that the power of the Procurator General at the time to bring an extraordinary appeal against the judgement restituting their property violated the right to equality before the court. By annulling an irrevocable judgement, the Supreme Court violated the principle of legal certainty and by deciding that the courts could not judge claims for expropriation, also breached their right of access to the courts. In reply to the State party's objection to the citing of the jurisprudence of the European Court of Human Rights, the authors state that they have referred to this jurisprudence since it relates to a similar case and since article 6 of the European Convention and article 14 of the Covenant are similar in nature.

Consideration of the merits

10.1 The Human Rights Committee has considered the present communication in the light of all the information made available to it by the parties, as provided in article 5, paragraph 1, of the Optional Protocol.

10.2 The authors' main claim relates to the reversal of the judgement in their case by the Supreme Court on 8 May 1996. In this respect, the Committee notes that it is undisputed that the Procurator General appealed the Court of Appeal judgement in the authors' case after it had become final and had been implemented. Following the Supreme Court's decision, the authors' property was again transferred to State ownership and subsequently sold by the State. The Committee considers that the principle of equality before the law entails that judgements, once they have become final, can no longer be appealed or reviewed, except in special circumstances when the interests of justice so require, and on a non-discriminatory basis. In the present case, no legitimate arguments have been adduced that could justify the annulment of the final judgement in the authors' case. The State party itself has acknowledged that the practice of extraordinary appeals by the Procurator General led to legal insecurity and for these reasons has abolished the possibility of such appeals in 2003. The Committee concludes that the Procurator General's appeal in the authors' case and the subsequent 1996 judgement of the Supreme Court, which annulled the final judgement of the Court of Appeal, which had overturned the first instance judgement that discriminated against the authors on the basis of their residence abroad, constitutes a violation of the authors' rights under article 26 of the Covenant, read in conjunction with article 2, paragraph 3, of the Covenant.

10.3 In the light of the above finding, the Committee considers that it is not necessary to examine the authors' claims under articles 12 and 14 of the Covenant.

11. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol, is of the view that the facts before it disclose a violation of article 26, read in conjunction with article 2, paragraph 3, of the International Covenant on Civil and Political Rights.

12. In accordance with article 2. paragraph 3 (a), of the Covenant, the State party is under an obligation to provide the authors with an effective remedy, including prompt restitution of their property or compensation therefore.

13. Bearing in mind that, by becoming a party to the Optional Protocol, the State party has recognized the competence of the Committee to determine whether there has been a violation of the Covenant or not and that, pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the Covenant and to provide an effective and enforceable remedy in case a violation has been established, the Committee wishes to receive from the State party, within ninety days, information about the measures taken to give effect to the Committee's Views.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the Committee's annual report to the General Assembly.]

Notes

[1] Article 330 of the Romanian Code of Civil Procedure.

[2] *Brumarescu v. Romania* (Application No. 28342/95; judgement of 28 October 1999), para. 62.

[3] *Simunek et al. v. Czech Republic*, communication No. 516/1992, Views adopted on 19 July 1995, para. 4.5.

FF. Communication No. 1159/2003, *Sankara v. Burkina Faso*
(Views adopted on 28 March 2006, eighty-sixth session)*

Submitted by:	Mariam Sankara et al. (represented by counsel)
Alleged victim:	Mariam, Philippe, Auguste and Thomas Sankara
State party:	Burkina Faso
Date of communication:	15 October 2002 (initial submission)
Decision on admissibility:	9 March 2004
Subject matter:	Failure to conduct a public inquiry or legal proceedings following the assassination; denial of justice based on political opinions
Procedural issues:	Request for re-examination of the admissibility decision of 9 March 2004
Substantive issues:	Failure to conduct a public inquiry or legal proceedings following the assassination; inhuman treatment; failure to correct a death certificate; denial of justice; principle of "equality of arms"; right to be heard by an independent and impartial court within a reasonable period; right to security of the person; discrimination based on political opinions
Articles of the Covenant:	Articles 7; 9, paragraph 1; 14, paragraph 1; 26
Article of the Optional Protocol:	Article 5, paragraph 1

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 28 March 2006,

Having concluded its consideration of communication No. 1159/2003, submitted on behalf of Mariam, Philippe, Auguste and Thomas Sankara under the Optional Protocol to the International Covenant on Civil and Political Rights,

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* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Nisuke Ando, Mr. Prafullachandra Natwarlal Bhagwati, Ms. Christine Chanet, Mr. Maurice Glèlè Ahanhanzo, Mr. Edwin Johnson, Mr. Walter Kälin, Mr. Ahmed Tawfik Khalil, Ms. Elisabeth Palm, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Ivan Shearer, Mr. Hipólito Solari-Yrigoyen, Ms. Ruth Wedgwood and Mr. Roman Wieruszewski.

Having taken into account all written information made available to it by the authors of the communication and the State party,

Adopts the following:

Views under article 5, paragraph 4, of the Optional Protocol

1.1 The authors, Ms. Mariam Sankara (born on 26 March 1953 and residing in France) and her sons Philippe (born on 10 August 1980 and residing in France) and Auguste Sankara (born on 21 September 1982 and residing in France) are, respectively, the wife and children of Mr. Thomas Sankara, former President of Burkina Faso, who died on 15 October 1987. The authors state that they are acting on behalf of Mr. Thomas Sankara and as victims themselves. They allege violations by Burkina Faso of: article 6, paragraph 1, of the Covenant in connection with Thomas Sankara; articles 2, paragraphs 1 and 3 (a) and (b), 14, paragraph 1, 17, 23, paragraph 1, and 26 of the Covenant in connection with Ms. Sankara and her children; and also article 16 of the Covenant in the case of Auguste Sankara. The authors are represented by counsel, Vincent Valai and M. Milton James Fernandes, of the Collectif Juridique Internationale Justice pour Sankara.

1.2 The Covenant and the Optional Protocol thereto entered into force for Burkina Faso on 4 April 1999.

Facts as submitted by the authors

2.1 On 15 October 1987, Thomas Sankara, President of Burkina Faso, was assassinated during a coup d'état in Ouagadougou.

2.2 From 1987 to 1997, the authorities did not, according to the authors, conduct any inquiry into this assassination. Moreover, on 17 January 1988, a death certificate was issued, falsely stating that Thomas Sankara had died of natural causes.

2.3 On 29 September 1997, within the 10-year statute of limitations, Ms. Mariam Sankara, in her capacity as spouse and on behalf of her two minor children, lodged a complaint with the senior examining judge in the Ouagadougou Tribunal de Grande Instance against a person or persons unknown for the assassination of Mr. Thomas Sankara and also for the falsification of administrative documents. On 9 October 1997, the authors deposited a bond of 1 million CFA francs, in accordance with the Code of Criminal Procedure.

2.4 On 29 January 1998, the Procurator General of Faso issued a direction not to commence a judicial investigation, challenging the jurisdiction of the ordinary courts on the grounds that the alleged events occurred in a military establishment among members of the armed forces and non-combatant personnel, and that the death certificate had been issued by the armed forces health service and signed by a physician who had the rank of commander, and was hence a member of the armed forces.

2.5 On 23 March 1998, by order No. 06/98, the examining judge decided, on the contrary, that the Ouagadougou Tribunal de Grande Instance was the ordinary court competent to examine the case.[1]

2.6 On 2 April 1998, the Procurator of Faso appealed against this decision.[2]

2.7 On 10 December 1999, in the absence of a decision by the Court of Appeal's indictment division, counsel for the authors formally requested the Minister of Justice and the Higher Council of the Judiciary to take all necessary measures in order to ensure the impartiality of justice.

2.8 On 26 January 2000, by decision No. 14, the Ouagadougou Court of Appeal set aside order No. 06/98 of 23 March 1998 and declared the ordinary courts incompetent.

2.9 According to the authors, despite Court of Appeal decision No. 14 and their own application of 27 January 2000, the Procurator of Faso refused or omitted to report the case to the Minister of Defence so that the Minister could institute proceedings.

2.10 On 27 January 2000, counsel challenged decision No. 14 by lodging an appeal with the judicial division of the Supreme Court.

2.11 On 19 June 2001, by decision No. 46, the Supreme Court declared the appeal inadmissible on the grounds that no bond had been deposited.[3]

2.12 On the same day, counsel requested the Prosecutor-General attached to the Supreme Court to report the case to the Minister of Defence so that the Minister could institute proceedings.[4] Also on the same day, in anticipation of a notification from the Procurator's Office, counsel requested the Minister of Defence to issue an order to initiate proceedings.

2.13 On 19 June 2001, during an interview on Radio France Internationale focusing largely on the Sankara case, the President of Burkina Faso stated that the Minister of Defence should not have to deal with court cases.[5]

2.14 On 25 June 2001, a further application was addressed to the Procurator of Faso.

2.15 On 23 July 2001, the Procurator of Faso replied to counsel, stating that their request related to acts categorized as offences committed on 15 October 1987, in other words, over 13 years and 8 months previously, and that, in its decision of 26 January 2000, the Court of Appeal had declared itself incompetent and had instructed the parties to refer the matter to a different court.

2.16 On 25 July 2001, counsel challenged the reply provided by the Procurator of Faso,[6] and once again requested that the case should be brought before the military courts, in accordance with article 71 (3) of the Code of Military Justice, since a claimant for criminal indemnification may not lodge an appeal. To date, no reply from the Procurator, and hence no referral to the Minister of Defence, have been reported.

The complaint

3.1 The authors consider that the failure to organize a public inquiry and legal proceedings to determine the identity and civil and criminal responsibilities of Thomas Sankara's assassins, and also the failure to correct his death certificate, constitute a serious denial of justice in terms of their protection as members of the Sankara family, in breach of articles 17 and 23, paragraph 1, of the Covenant. They consider, moreover, that the failure to conduct an inquiry, and hence the failure to uphold guarantees relating to equality before the law, and also the Procurator's refusal to refer the case to the Minister of Defence, thus preventing their complaint from being resolved, are attributable to their political opinions, in breach of articles 2, paragraph 1, and 26 of the Covenant.

3.2 The authors maintain that the State party has failed to comply with its obligations (a) to provide them with an effective remedy for the violations they suffered, in accordance with article 2, paragraph 3 (a) and (b), of the Covenant, and (b) to guarantee the impartiality of justice as required under article 14, paragraph 1, of the Covenant. In this regard, the authors explain that the purpose of the decision taken by the court of first instance to declare the military courts competent and to require an abnormally high bond (1 million CFA francs) was to obstruct the examination of their complaint and, consequently, constituted a violation of the "equality of arms" principle. Similarly, the fact that their counsel were obliged to make a formal request to the Court of Appeal to issue a decision falls into the above category of violations. The authors consider that this also applied to the procedure before the Supreme Court, in particular because the President of the Supreme Court is a supporter of both the ruling party and the serving President, and because the decision to rule the appeal inadmissible on the grounds that no bond had been paid was in fact a pretext for not ruling on the merits of the case.

3.3 The authors consider that, as a minor, Auguste Sankara should have been exempted from deposit of a bond under the legislation in force. However, by its decision of 19 June 2001, the Supreme Court refused to recognize him as a minor, in breach of article 16 of the Covenant.

3.4 Lastly, the authors maintain that the authorities' refusal to correct Thomas Sankara's death certificate constitutes a continuing violation of article 6, paragraph 1, of the Covenant.

Observations of the State party on the admissibility of the communication

4.1 In its observations of 1 April 2003, the State party contests the admissibility of the communication.

4.2 The State party conducts what it terms a historical review, focusing primarily on the conditions under which Captain Thomas Sankara came to power on 4 August 1983 and the consequences of this development in terms of human rights violations. The State party describes what it calls a process of democratization and national reconciliation under way since 1991. It also describes the remedies available in Burkina Faso.

4.3 The State party considers that the authors have abused the procedure afforded by the Optional Protocol. In this regard, it points out that, on 30 September 2002, the authors lodged with the senior examining judge in the Ouagadougou Tribunal de Grande Instance a complaint against a person or persons unknown for failure to produce the corpse, accompanied by an application for criminal indemnification. On 16 October 2002, without awaiting the results of this application, the authors submitted a complaint to the Committee. On 16 January 2003, the Procurator of Faso issued a direction not to commence a judicial examination, invoking the previous complaint by the claimant concerning the death of Thomas Sankara. On 3 February 2003, the examining judge in the Ouagadougou Tribunal de Grande Instance issued an order declaring the complaint unfounded, given that the same claimant had, in

September 1997, lodged a complaint concerning the assassination of the same person, whose death had been confirmed by the evidence. In the State party's opinion, therefore, the authors had brought the matter before the Committee even though proceedings were pending in the national courts.

4.4 The State party also considers the authors' complaint inadmissible on the grounds that the events in question occurred prior to Burkina Faso's accession to the Covenant and the Optional Protocol, namely, 15 years ago. Furthermore, the State party is of the view that the authors cannot claim a denial of justice in connection with these events, given that there has been no such denial.

4.5 In the State party's opinion, the condition that domestic remedies must have been exhausted has not been met.

4.6 The State party explains that, following the Supreme Court's inadmissibility decision of 19 June 2001 on the grounds of non-payment of the bond, the authors refrained from making use of non-contentious remedies, and consequently cannot claim that the system for the protection of human rights in Burkina Faso is inadequate or that their constitutional right of access to the courts has been violated. The State party asserts, in this regard, that no appeals have been made to:

- The Médiateur (ombudsman) of Faso (as the allegations were linked to the operation of the machinery of the State, the complainant could, under articles 11 and 14 of Act No. 22/94/ADP of 17 May 1994 instituting the office of ombudsman, have brought the case before him for the purposes of State mediation);

- The Collège des sages (panel of elders): the complainant could, like victims of the events of 15 October 1987, have brought the case before this Collège, which was established on 1 June 1999;

- The National Reconciliation Commission (having taken over from the Collège des sages, the Commission had competence to identify economic crimes and crimes of violence committed in Burkina Faso since it became independent in 1960, with a view to proposing recommendations conducive to national reconciliation);

- The Compensation Fund for Victims of Political Violence (despite the fact that the death of Thomas Sankara was attributed to a situation of political violence, the complainant did not approach the Fund, unlike victims of the events of 15 October 1987).

4.7 Similarly, in the State party's view, not all contentious remedies have been exhausted. In respect of complaints of denial of justice, a remedy is available for anyone who considers that he or she is a victim of such a violation under article 4 of the Civil Code,[7] article 166 of the Penal Code[8] and article 281 of order No. 91-51 of 26 August 1991 relating to the organization and functioning of the Supreme Court. However, Ms. Sankara has not made use of these remedies. As to the complaint relating to the President of the Supreme Court, in conformity with articles 648-658 of the Code of Criminal Procedure and articles 291 and 292 of order No. 91-51, any party to proceedings who harbours legitimate suspicions about a judge who will be called upon to rule on his or her interests may apply for disqualification of the judge. The author has not in fact used this remedy. Similarly, she has not made use of articles 283 and 284 of order No. 91-51 providing for penalties in the event of denial of justice.

4.8 In the opinion of the State party, the author also, through negligence or ignorance, committed procedural errors which prevented her application from being examined on the merits. The State party refers to the tardy lodging of the complaint, namely on 29 September 1997, whereas the statute of limitations expired on 15 October 1997, i.e. 10 years after the alleged events. The author was thus running the risk of her complaint being time-barred in the event of referral to a court which lacked jurisdiction. In the State party's view, referral to the Tribunal de Grande Instance, in lieu of the military court, constitutes a procedural error attributable to the author. Given the victim's status (Thomas Sankara was a captain in the regular army of Burkina Faso) and the location where the events occurred (the premises of the Conseil de l'Entente, classed as a military zone during the revolutionary period), the author should quite naturally, in accordance with the law, have brought the matter before the military courts. In the opinion of the State party, the time-barring of the proceedings, which was related to the tardy referral to the courts, and the procedural error invalidated any proceedings before the military court. Consequently, the author cannot blame the Procurator for having refused to refer the case to the Minister of Defence, in conformity with the provisions of the Code of Military Justice. Furthermore, in its view, the author cannot invoke the dismissal of the appeal to the Supreme Court for non-payment of the bond as a ground for denial of justice, since it was incumbent on her to conform to the procedures provided for by law.

4.9 Lastly, the State party claims inadmissibility as to substance in view of the political nature of the complaint. In its view, the late referral of her husband's death to the national courts indicates the author's clear lack of interest in establishing the truth through the law. The State party considers that the facts of the case are fundamentally political since they occurred in a particularly troubled national context which was linked, first, to the aberrations of the revolutionary regime and the risks of instability in the country, and secondly to the military coup which was rendered necessary by circumstances. Lastly, the author's quest for justice is fundamentally political in nature and constitutes an abuse of law. In the State party's view, the author has set herself the goal of avenging her dead husband. Since her decision to go into exile immediately after the events in question, she has persisted in taking numerous initiatives aimed at damaging the country's image. In its opinion, despite the steps taken to facilitate her return to the country, the author has stubbornly remained abroad, where she has the status of a political refugee. Her complaint, therefore, does not fall within the competence of the Committee.

The authors' comments on admissibility

5.1 In their comments of 30 August 2003, the authors contest the State party's arguments on admissibility.

5.2 In the first place, the authors stress that their complaint must be also viewed from the standpoint of article 7 of the Covenant, in that the authorities' refusal to conduct a proper inquiry and to establish the facts surrounding the death of Thomas Sankara may be regarded as cruel, inhuman and degrading treatment inflicted on them. Thus, the authorities prevented them from finding out the circumstances of the victim's death and the precise place where his remains were officially buried. Lastly, the unlawful conduct of the State has had the effect of intimidating and punishing the Sankara family, who have been unjustly left in a state of uncertainty and mental distress.[9]

5.3 The authors consider that the State party's arguments on inadmissibility of the complaint *ratione materiae* and its allegedly political character are without legal basis. In their view, the Committee is competent to consider the facts of the present communication, which admittedly pre-date Burkina Faso's accession to the Optional Protocol, but represent a continuing violation of the Covenant and produce effects which themselves constitute violations of the Covenant to this day, account being taken of the acts of the Government and decisions of the courts since the Covenant's entry into force.

5.4 The authors maintain that the communication as a whole is admissible in that Burkina Faso has failed to comply with its obligations under the Covenant. Citing communication No. 612/1995 (*Vicente v. Colombia*, Views of 29 July 1997), the authors refer, first, to the fact that the State party did not fulfil its obligation to conduct an inquiry into the death of Thomas Sankara. Secondly, the State party has never denied its failure to fulfil that obligation under the Covenant, a violation which occurred before and after accession to the Optional Protocol. They further note that Thomas Sankara's death certificate falsely attributed his death to natural causes, and that the State party refused or wilfully omitted to rectify it before and after it acceded to the Optional Protocol. Thirdly, the authors consider that, in its observations, the State party made an admission of legal significance, namely that the State authorities were fully aware that Thomas Sankara had not died of natural causes, but did nothing about it.

5.5 The authors emphasize that the acts and wilful omissions on the part of the State party have continued since its accession to the Optional Protocol, and have constituted continuing violations of the Covenant. They recall that they initiated judicial proceedings on 29 September 1997, within the 10-year statute of limitations, because of the authorities' refusal to respect their obligations, and draw attention to the attitude of the authorities, who endeavoured to obstruct or delay their appeals.

5.6 The authors consider that the Court of Appeal was tardy in handing down its decision of 26 January 2000, after their counsel had served a notice to perform. They recall that following that decision declaring the ordinary courts incompetent, the authorities concerned refused or omitted to refer the case to the Ministry of Defence in order that proceedings might be brought in the military courts, as provided for in article 71 (1) and (3) of the Code of Military Justice. On 27 January 2000, therefore, the authors lodged an appeal with the Supreme Court challenging the validity of the decision of the Court of Appeal.

5.7 According to the authors, when they lodged the appeal with the Supreme Court on 27 January 2000, the registrar refused or wilfully omitted to give the counsel formal notification of the requirements laid down in article 110 of order No. 91-0051/PRES of 26 August 1991. He also omitted to ascertain whether article 111 of that order[10] applied, in other words to ascertain the age of Auguste Sankara in order to determine whether he was a minor. By its decision of 19 June 2001, the Supreme Court refused or wilfully omitted to remedy the registrar's violations and to verify *proprio motu* the age of Auguste Sankara, who, having been born on 21 September 1982, was in fact a minor when the appeal was lodged - thus committing two separate violations of Auguste Sankara's rights under article 16 of the Covenant. In addition, the authors draw attention to the fact that counsel were not allowed to pay 5,000 CFA francs when making their application, and that the Supreme Court refused to examine the case on the merits, on the sole grounds that payment of 5,000 CFA francs[11] was required, and hence to permit continuation of the proceedings.

5.8 The authors again refer to the authorities' wilful failures to act at various stages of the proceedings, namely, their failure to refer the matter to the Minister of Defence in order that proceedings might go ahead before a military court, when in fact such an action is required under the above-mentioned article 71 (3).

5.9 As to the exhaustion of domestic remedies, the authors, referring to the Committee's jurisprudence,[12] state that the Covenant requires criminal proceedings to be initiated at the national level in the case of serious violations, and in particular unlawful deaths. As the State wilfully omitted or refused to initiate any form of inquiry or civil, criminal or military proceedings, the authors explain that they then lodged a complaint against a person or persons unknown in connection with the death of Thomas Sankara and the rights of his family, insofar as that was the only domestic remedy available in respect of the alleged violations. They recall that they were unable to initiate such proceedings before the military courts under article 71 (3) of the Code of Military Justice. On the basis of the Committee's jurisprudence,[13] the authors maintain that none of the remedies mentioned by the State party may be regarded as effective, given their purely disciplinary or administrative nature, and the fact that they are not legally binding on the public authorities (in the case of non-contentious remedies) and cannot provide an effective remedy for alleged serious violations (in the case of contentious remedies). As to domestic remedies for denial of justice, the authors, citing the Committee's jurisprudence,[14] consider that it is incumbent on the Committee to determine whether the Supreme Court violated its obligations of independence and impartiality, and that they could not, at the time of their appeal, know in advance what action the Court would take. In their opinion, the application for disqualification of the President of the Supreme Court could not constitute an effective recourse in that it would not remedy the irreversible effects of the Court's decision, which is not appealable. With regard to the appeal of 20 September 2002 concerning the failure to produce the body of Thomas Sankara, the authors state that the purpose of that appeal was to obtain direct evidence concerning the circumstances of the victim's death, and that the appeal could not remedy the alleged violations vis-à-vis the members of his family. The authors add that the only effective and adequate remedy for the family members was exhausted by the Supreme Court decision of 19 June 2001. Lastly, in conformity with the Committee's jurisprudence,[15] the authors consider that they could not be required to apply for habeas corpus.

5.10 The authors made further submissions concerning the merits of the communication. They point out that, in its observations, the State party officially admitted that the authorities knew the death of Thomas Sankara on 15 October 1987 was not due to natural causes. From that they conclude that the appeal lodged on 30 [sic] September 2002 is no longer necessary. They further note that the then Minister of Justice, now the President of Burkina Faso, did not institute proceedings despite being aware that the victim did not die a natural death. Similarly, the Procurator of Faso and the Minister of Defence did not ensure that the Supreme Court's decision was referred to the military courts. The authors again refer to the statement made by the President of Burkina Faso on Radio France Internationale on 19 June 2001 and consider it to be in breach of article 71 (1) and (3) of the Code of Military Justice, which establishes, among the duties of the Minister of Defence, his exclusive competence to order proceedings in the military courts. The authors stress that whenever a violation has been reported by a civilian examining judge, Procurator of Faso or Procurator General, the Minister of Defence has ordered proceedings to be brought. According to the authors, who refer to a statement in *Le Pays*,[16] the Minister of Defence personally refused to exercise the powers conferred on him by article 71 (3) of the Code of Military Justice. They again stress that all the judicial authorities, including the Procurator of Faso and the Procurator General, have either refused to allow, or wilfully prevented or omitted to initiate, proceedings in the military courts.

Decision on admissibility

6.1 At its eightieth session, the Committee examined the admissibility of the communication.

6.2 The Committee noted the State party's arguments concerning the inadmissibility of the communication *ratione temporis*. Having also noted the authors' arguments, the Committee considered that a distinction should be drawn between the complaint relating to Mr. Thomas Sankara and the complaint concerning Ms. Sankara and her children. The Committee considered that the death of Thomas Sankara, which may have involved violations of several articles of the Covenant, occurred on 15 October 1987, hence before the Covenant and the Optional Protocol entered into force for Burkina Faso.[17] This part of the communication was therefore inadmissible *ratione temporis*. Thomas Sankara's death certificate of 17 January 1988, stating that he died of natural causes - contrary to the facts, which are public knowledge and confirmed by the State party (paras. 4.2 and 4.7) - and the authorities' failure to correct the certificate during the period since that time must be considered in the light of their continuing effect on Ms. Sankara and her children.

6.3 In conformity with its jurisprudence,[18] the Committee was of the view that it could not consider violations which occurred before the entry into force of the Optional Protocol for the State party unless those violations continued after the Protocol's entry into force. A continuing violation is to be interpreted as an affirmation, after the entry into force of the Optional Protocol, by act or by clear implication, of previous violations by the State party. The Committee took note of the authors' arguments concerning, first, the failure of the authorities to conduct an inquiry into the death of Thomas Sankara (which was public knowledge) and to prosecute those responsible - allegations which are not in fact challenged by the State party. These constitute violations of their rights and of the obligations of States under the Covenant.[19] Secondly, it was clear that in order to remedy this situation, the authors initiated judicial proceedings on 29 September 1997, i.e. within the limits of the 10-year statute of limitations, and these proceedings continued after the Covenant and the Optional Protocol entered into force for Burkina Faso. Contrary to the arguments of the State party, the Committee considered that the proceedings were prolonged, not because of a procedural error on the part of the authors, but because of a conflict of competence between authorities. Consequently, insofar as, according to the information provided by the authors, the alleged violations resulting from the failure to conduct an inquiry and prosecute the guilty parties have affected them since the entry into force of the Covenant and the Optional Protocol because the proceedings have not concluded to date, the Committee considered that this part of the communication was admissible *ratione temporis*.

6.4 As to the exhaustion of domestic remedies, and the State party's argument of inadmissibility based on failure to make use of non-contentious remedies,[20] the Committee recalled that domestic remedies must be not only available but also effective, and that the term "domestic remedies" must be understood as referring primarily to judicial remedies. The effectiveness of a remedy also depended, to a certain extent, on the nature of the alleged violation.[21] In the present case, the alleged violation concerned the right to life, and was linked primarily to the alleged failure to conduct an inquiry and to initiate proceedings against the guilty parties, and secondarily to the alleged failure to correct the victim's death certificate, as well as to the failure of the appeals initiated by the authors in order to remedy the situation. In these circumstances, the Committee considered that the non-contentious remedies mentioned by the State party in its submission could not be considered effective for the purposes of article 5, paragraph 2 (b), of the Optional Protocol.[22]

6.5 With regard to the State party's claims relating to the non-use of certain contentious remedies concerning the denial of justice, the Committee noted that the State party had confined itself to a mere recital of remedies available under Burkina Faso law, without providing any information on the relevance of those remedies in the specific circumstances of the case or demonstrating that they would have constituted effective and available remedies. With particular regard to the application for disqualification of the President of the Supreme Court, the Committee considered that the authors could not know the Court's decision in advance, and that it would be for the Committee to determine, in the examination of the merits, whether the President's decision had been arbitrary or constituted a denial of justice.

6.6 On the question of the claim of inadmissibility on the ground that the authors had lodged a complaint with the Committee when proceedings were pending before the national courts, the Committee could not accept this argument in that the additional remedy introduced by the authors in connection with the complaint of 30 September 2002 against a person or persons unknown had been exhausted at the time the communication was examined.

6.7 As to the State party's claim concerning prescription resulting from the tardy and procedurally incorrect referral of the case to the courts, the Committee considered it unfounded as set out above (cf. para. 6.3). Moreover, the Committee cannot accept this argument in support of the State party's assertion that the Procurator could not be blamed for having refused to refer the case to the Minister of Defence. In this connection, the Committee found that the grounds for refusal adduced by the Procurator on 23 July 2001 were manifestly unfounded since (a) as set forth above, that statute of limitations could not be applied (and had not in fact been applied by the various authorities throughout the proceedings), and (b) the authors could not themselves bring the case before the military courts (the only competent jurisdiction, the Court of Appeal's decision No. 14 having become final following decision No. 46 of the Supreme Court). Only the Minister of Defence, after referral by the Procurator, could issue the order to initiate proceedings, failing which it would be invalid. Hence the Procurator wrongly halted the proceedings initiated by the authors and, furthermore, did not respond to their appeal of 25 July 2001, a fact which has not been commented on by the State party.

6.8 Lastly, the Committee considered that the authors exhausted domestic remedies in conformity with article 5, paragraph 2 (b), of the Optional Protocol.

6.9 As to the State party's argument about the allegedly political character of the complaint, the Committee considered that this in no way affected the admissibility of the communication and, in fact, fell within the scope of the examination of the communication on the merits.

6.10 Regarding the complaints of violations of articles 17 and 23 of the Covenant, the Committee considered that the authors' allegations concerning the consequences, where their protection in particular was concerned, of the failure to conduct an inquiry into the death of Thomas Sankara and to identify those responsible did not fall within the scope of the articles mentioned, but did raise issues with respect to article 7[23] and article 9, paragraph 1,[24] of the Covenant.

6.11 Concerning the complaint of a violation of article 16 of the Covenant, the Committee considered that the authors' allegations did not fall within the scope of this article, but might raise issues with regard to article 14, paragraph 1.

6.12 On the question of the complaints under article 14, paragraph 1, and article 26 of the Covenant (cf. para. 3.1), the Committee considered that these allegations had been sufficiently substantiated for purposes of admissibility. The Human Rights Committee therefore decided that the communication was admissible under articles 7, 9, paragraph 1, 14, paragraph 1, and 26 of the Covenant.

State party's observations on the merits

7.1 On 27 September 2004, the State party forwarded its observations on the merits. It considers that in its decision on admissibility, the Committee, by recharacterizing some of the authors' allegations, prejudged its decision on the merits and ignored the principle of the presumption of innocence. The State party reiterates that the use of domestic remedies by the author was characterized by wilful omissions which constitute an abuse of the procedure under the Optional Protocol.

7.2 Concerning the allegation under article 2, paragraph 1, and article 26 of the Covenant, the State party considers that the authors have not demonstrated that the Sankara family suffered discrimination because of their political views. The authors cannot cite their lack of success in the judicial proceedings as evidence of such discrimination since they are not active in any political party in Burkina Faso, do not live there and play no direct part in national political life. In any event, in the view of the State party, the authors cannot validly claim a violation of article 2, paragraph 1, of the Covenant because at the time the Covenant and the Optional Protocol entered into force for Burkina Faso in April 1999, the State party could no longer legally institute an investigation into the death of Thomas Sankara. The State party maintains that, since all legal action regarding this matter has been time-barred since 15 October 1997, no continuing violation of the Covenant can be alleged, unless it were to be considered that domestic law became invalid on the entry into force of the Covenant for Burkina Faso, which is not the case.

7.3 With regard to the alleged violation of article 2, paragraph 3, of the Covenant, the State party considers that the Committee has indicated a preference for contentious remedies (para. 6.4), whereas the possibility of the use of non-contentious remedies cannot be ruled out. The State party explains that in practice these procedures can often prove more effective than contentious procedures. It enumerates the non-contentious remedies available in Burkina Faso, which are effective remedies, and which have in most cases proved more important and more effective than contentious remedies, but which the authors refused to pursue (cf. para. 4.6). The

State party holds that contentious remedies are also effective, but that the Sankara family expected "special justice" because of its history, in breach of the principle of equality before the law and justice.

7.4 Concerning the alleged violation of article 6, paragraph 1, of the Covenant, the State party explains that legally Thomas Sankara's death certificate is an administrative document, and that it was incumbent on the Sankara family, in keeping with the current legislation, to apply to the competent administrative court to have it cancelled or corrected. The State party also considers that the failure to correct the death certificate does not in itself constitute a violation of the right to life.

7.5 Concerning the alleged violation of article 14, paragraph 1, of the Covenant, the State party outlines its legislation guaranteeing the independence of the judicial system. It also maintains that in the present case the authors have not demonstrated that the judges were biased. Thus the judge in the court of first instance has discretion to set the amount of the bond in the light of the circumstances of the case. Setting the amount at 1 million CFA francs cannot by itself indicate bias in the judge's decision, since the amount varies with the importance of the case and the parties involved. The State party claims that this amount is in no way exceptional in the context of the customary practice of courts in Burkina Faso.[25] As for the deposit of security at the appeal stage, which stands at 5,000 CFA francs, payment is legally mandatory for all persons lodging an appeal, failing which the application is inadmissible. According to the State party, the authors, having omitted to comply with this formality, cannot allege or presume bias on the part of the judges. The State party also considers that citing the political links of the President of the Appeal Court cannot stand up to examination, in view of the fact that the Appeal Court's decisions are in any event collective, and that the complainant was free to apply for the disqualification of the President of the Appeal Court in accordance with the current legislation,[26] but did not do so. In any event, in the State party's view, losing a case constitutes insufficient grounds for describing a judge as partisan or a court as biased.

7.6 With regard to the alleged violation of article 16 of the Covenant, which the Committee preferred to recategorize in terms of article 14, paragraph 1, of the Covenant, the State party holds that, contrary to the authors' claims, exempting minors from the requirement to deposit a bond, in accordance with article 111 of order No. 91-0051/PRES of 26 August 1991, cannot be regarded as mandatory, so that it was not incumbent on the Supreme Court to note *proprio motu* Auguste Sankara's status as a minor. Moreover, Auguste Sankara's application is not separate from those of the other members of the family, and consequently cannot be considered separately.

7.7 Concerning the alleged violation of article 17 of the Covenant, which the Committee preferred to recategorize in terms of articles 7 and 9, paragraph 1, of the Covenant, the State party explains that the failure to hold an inquiry into the death of Thomas Sankara and identify those responsible are not admissible, in view of the fact that the events pre-dated the entry of the Covenant into force for Burkina Faso. The State party maintains that article 7 of the Covenant cannot be invoked insofar as the authors have never been harassed, and have never suffered from treatment to which this provision refers. Moreover, such an allegation would involve a physical impossibility, insofar as the authors have not lived in Burkina Faso since the events of 1987. Similarly, according to the State party, article 9, paragraph 1, of the Covenant cannot be invoked since the authors no longer live in Burkina Faso.

7.8 Concerning the allegation that article 23 of the Covenant was violated, which the Committee ruled inadmissible, the State party, after referring to its legislation recognizing and guaranteeing the rights of the family, points out that the authors cannot accuse Burkina Faso of not having protected them, since they no longer live in the country and voluntarily removed themselves from the supervision of the Burkina Faso authorities by seeking refugee status abroad, though they were in no way at risk, or being harassed.

7.9 The State party reiterates its position that the authors' complaint constitutes an abuse of process, insofar as it pursues purely political aims. According to the State party, it would be difficult to subject the facts alleged by the complainant to a legal assessment in the light of Burkina Faso's international human rights commitments, owing to their political nature. What are involved are incidents closely related to the country's political life which occurred in a troubled national context that was linked to the aberrations of the revolutionary regime and the risks of instability in the country and to the military coup which was rendered necessary by circumstances. Hence these incidents cannot be dissociated from the events of 15 October 1987, and the Committee cannot evaluate them independently of their context. The State party claims that the Committee would be exceeding its authority if it were nevertheless to examine all of these incidents. It explains that Ms. Sankara has set herself the goal of seeking revenge for her dead husband, and harming the image of the country and the Government.

7.10 Lastly, the State party calls on the Committee to reject the communication and rule that there has been no violation since the Covenant entered into force. It adds that, at the express request of the parties concerned, the Government is nonetheless prepared to check Thomas's death certificate and, if necessary, to have it corrected, in keeping with the applicable laws and regulations in force in Burkina Faso. In any event, according to the State party, there is nothing to prevent the authors from returning to Burkina Faso or living there. The State party maintains that it guarantees security and protection to all persons living on its territory or subject to its jurisdiction. Furthermore, if the authors consider themselves to be under threat or lacking security, it is for them to seek special protection from the competent authorities. However, according to the State party, Burkina Faso cannot effectively guarantee protection for its nationals living in a foreign State. In addition, according to the State party, it remains true that the security of the authors has never been disturbed at the hands of Burkina Faso in the various countries where they have chosen to live (Gabon, France, Canada).

Authors' comments

8.1 In their comments dated 15 November 2004, the authors state that they are presenting new elements which would warrant a partial revision of the Committee's decision on admissibility. They consider that, in its observations on the merits, the State party acknowledged that Thomas Sankara did not die a natural death and that a number of public figures were aware of the circumstances surrounding the events of 15 October 1987.

8.2 Consequently, the authors first request the Committee to declare admissible the allegation under article 6 of the Covenant, a provision which obliges the State party to investigate and prosecute those responsible for violations of Thomas Sankara's right to life, and to respect and guarantee Thomas Sankara's right to life.[27] According to the authors, the State party's obligation to protect the human dignity of Thomas Sankara continues after his death.[28] The failure to comply with the obligation to establish the circumstances of the acknowledged extrajudicial death of an individual is an affront to human dignity. In the light of the evidence that

Mr. Sankara did not experience a natural death, notwithstanding his death certificate, but was in fact assassinated during a coup d'état, the authors deem it vital for the State party to protect his dignity by embarking on a judicial investigation and determining the circumstances of his death, and then correcting the death certificate.

8.3 Secondly, the authors call on the Committee to declare admissible the allegation under article 16, on the grounds that the State party did not supply a copy of Supreme Court decision No. 46 of 19 June 2001 or did not recognize the authenticity of the copy they themselves submitted. The authors reiterate that the Supreme Court arbitrarily denied Auguste Sankara's right to be recognized as a person before the law. According to the authors, since the provisions of article 111 of order No. 91-0051/PRES of 26 August 1991 relating to minors are mandatory, it was incumbent on the Supreme Court to note *proprio motu* the status of Auguste Sankara as a minor, to grant him exemption from the bond requirement and thus to grant him the right of access to the courts. In addition, the authors point out that when the right of a person to be recognized by the law is violated, article 14 of the Covenant is necessarily violated.

8.4 The authors also reiterate their comments relating to violations of articles 7 and 9, paragraph 1, by the State party. They emphasize that the State party's response to the above-mentioned new elements relating to the role played by President Blaise Compaoré in the death of Thomas Sankara will be vital in throwing light on the events of 15 October 1987.

8.5 The authors point out that the State party violated article 26 of the Covenant, protecting the right to equality before the law and to freedom from discrimination based on political opinions. Contrary to the State party's observations, the authors explain that a person may have a political opinion, even if he or she no longer lives in Burkina Faso, and is not involved in politics. The authors consider that the State party has not presented sufficient legal arguments to refute their detailed allegations. Moreover, the State party had noted that the surviving members of the Sankara family had been granted refugee status abroad. The granting of that status, in the authors' view, constitutes prima facie proof of the existence of discrimination based on political opinions in the country of origin. According to the authors, the State party's allegations that the Sankara family wished to benefit from special treatment in the Burkina Faso courts demonstrated a failure to understand the nature of the discrimination they had suffered, namely, the deliberate unfair treatment suffered by the authors in their dealings with a variety of official bodies in Burkina Faso.

8.6 In relation to article 14, paragraph 1, of the Covenant, the authors point out that the Supreme Court was guilty of a denial of justice in adopting its decision No. 46 of 19 June 2001, which the State party has still not supplied. The Committee's jurisprudence confirms that a decision taken by a country's highest court can in itself be the source of an alleged denial of justice.[29] The authors acknowledge that the Committee has no independent machinery which could conduct an investigation, and is generally not in a position to review the evidence and the facts as assessed by domestic courts. However, the authors refer to the exception to that rule set out in the case *Griffin v. Spain*.[30] In the authors' view, the Supreme Court displayed a lack of logic when it invoked the failure to pay the modest sum of 5,000 CFA francs in refusing to consider the merits of a case.

Supplementary observations by the State party on the authors' comments

9.1 In its supplementary observations of 15 October 2005, the State party reiterates its observations concerning inadmissibility. According to the State party, neither the failure to conduct an investigation, nor the alleged failure to correct the death certificate, nor the invoking of the violation of Thomas Sankara's dignity, can justify applying the provisions of the Covenant in respect of him retroactively, since there is no continuity in the events over time, and to do so would run totally counter to the principles of public international law. The State party maintains the argument of prescription to justify the fact that no investigation has been held since the Covenant entered into force. Furthermore, in bringing the case before a court which was manifestly incompetent to consider it, the authors brought on prescription by their own actions, since referral to an incompetent court does not interrupt the statute of limitations. In that way, it was not incumbent on the State party to institute proceedings after the Covenant had entered into force. In the present case, since the author of the communication had not indicated any act attributable to the State party which had been committed subsequently or had continued after the entry into force of the Covenant, the Committee could not validly rule on the facts without ignoring its own jurisprudence and a well-established international rule. Regarding the author's allegations that the last investigative action was taken on 29 September 1997, providing grounds for suspending the statute of limitations, the State party considers this to be a "pernicious interpretation" of article 7 of the Code of Criminal Procedure: the institution of proceedings is not an investigative act, because it is not brought before a competent court.

9.2 Concerning the allegations that the State party omitted or refused to correct Thomas Sankara's death certificate, before and after acceding to the Optional Protocol, the State party explains that the death certificate is no more than an act of recording by an expert, and not a civil registration document. A document prepared by an expert can be rectified or corrected only by an expert, a role the State party could not play, and the responsibility of an expert is and remains an individual and personal responsibility. Hence the failure to correct the death certificate cannot bring into play the responsibility of the State party.

9.3 The State party maintains that the authors' assertions regarding violation of the dignity of Thomas Sankara, allegedly constituting a continuing violation, are not substantiated and do not point to violations of the provisions of the Covenant. Sympathizers regularly visit Thomas Sankara's grave to pay tribute, he himself has been officially rehabilitated and honoured as a national hero, a number of political parties which are still represented in the National Assembly bear his name, and a heroes' monument is under construction in Ouagadougou, partly celebrating Thomas Sankara. In addition, according to the State party, the protection of dignity under the Covenant guarantees only the rights of living persons, and not the dead. Consequently, the allegation that Thomas Sankara's right to dignity has been violated is manifestly unfounded.

9.4 Concerning the alleged admissions of legal significance made by the State party in connection with Thomas Sankara's status as a victim, the State party notes the flimsiness of these observations and considers that the Committee should reaffirm its initial position regarding the inadmissibility of this part of the complaint.

9.5 In the view of the State party, the authors' observations demonstrate that the requirements for admissibility before the Committee have not all been met in this case, in relation to the Committee's partial decision on admissibility. The State party requests the

Committee to reconsider its admissibility decision. Not only have not all remedies been exhausted in relation to all their allegations, but in addition the allegations reflect an abuse of rights and abuse of process and are manifestly incompatible with the provisions of the Covenant.

9.6 The State party reaffirms that it has demonstrated the effectiveness of non-contentious remedies in the specific case of Burkina Faso, in the prevailing political and social context. The authors have not denied that these remedies are effective, and do not explain their steadfast refusal to make use of non-contentious remedies. The State party also reiterates that the authors have failed to use certain contentious remedies. It refers to its observations on admissibility, and in particular to article 123 of the Personal and Family Code, under which they could secure correction of the death certificate. Lastly, the State party maintains that Ms. Sankara, through negligence or ignorance, committed procedural errors which prevented consideration of the substance of her complaint, and it refers to its observations on admissibility.

9.7 In relation to abuse of process, the State party maintains that the complaints raised by the authors are more political than legal in nature, and are in fact directed at the country's President.

9.8 The State party puts forward the following arguments as to the merits. Regarding the alleged violation of article 2, the State party considers that these violations cannot have occurred in the present case, but if the Committee were to acknowledge such an obligation, the State party is prepared to present relevant arguments. Concerning the alleged violation of article 7, the State party holds that any accusation of cruel, inhuman and degrading treatment cannot be validly upheld in fact or in law, owing to the efforts made by the State party, which met with a categorical refusal on the part of Ms. Sankara. The State party refers to the efforts it has made to achieve reconciliation vis-à-vis Thomas Sankara, and in particular the fact that the location of his grave is public knowledge. The Sankara family cannot claim intimidation of any kind, insofar as its members no longer live in Burkina Faso. The State party considers that the authors have not demonstrated any act attributable to the State party which has caused either physical suffering or mental suffering such as to substantiate a violation of article 7.

9.9 Concerning the alleged violation of article 9, paragraph 1, the State party indicates that the authors have put forward the same arguments as for article 7, and that they have failed likewise to supply any specific arguments to back up the allegations. The authors have not been the victims of arrest or arbitrary detention, nor has their security been disturbed. Accordingly, the State party calls on the Committee to reject the allegation.

9.10 Concerning article 14, paragraph 1, the State party refers to its observations on the merits, in relation to the amount of the bond, which cannot alone indicate bias on the part of the judge. In addition, and citing the Committee's jurisprudence,[31] the State party maintains that the authors did not raise any irregularity before the judicial division of the Supreme Court. Moreover, concerning the authors' arguments based on *Griffin v. Spain*, the State party notes that they have not demonstrated the arbitrary and unfair nature of the proceedings in the Supreme Court, that they have not demonstrated any procedural irregularity, and that the only procedural obstacles which may be cited in the present case are attributable to the failure to deposit a bond, for which the authors have only themselves to blame.

9.11 Concerning article 26, the State party refers to its observations, adding that articles 1 and 8 of Burkina Faso's Constitution protect citizens against all forms of discrimination and guarantee freedom of expression. Discrimination is forbidden by the new 1996 Criminal Code, which lays down severe punishment. According to the State party, the authors have not demonstrated that they have political opinions which gave rise to discriminatory measures on the part of the authorities. Benefiting from refugee status in a foreign country does not in itself constitute proof of discrimination based on the political opinions of the beneficiary. According to the State party, the criteria used by each State in granting refugee status are in practice sometimes subjective, and the Sankara family members still living in Burkina Faso are not harassed in any way because of their political views. The State party calls on the Committee to reject the allegation that article 26 was violated.

Authors' comments on the State party's observations

10. In their comments of 15 January 2006, the authors reaffirm their earlier observations. Concerning the time bar, they explain that no court has called this matter into question, and that in relation to article 7 of the Code of Criminal Procedure[32] and the applicable case law, there has never been a time bar.

Request for reconsideration of the admissibility decision

11. The Committee has taken note of the request for reconsideration of its decision on admissibility, made both by the State party and by the authors. It points out that most of the arguments advanced in support of the request for reconsideration relate to parts of the communication which had already been thoroughly examined during consideration of the issue of admissibility, and that the other arguments must be analysed as part of the consideration of the merits. Consequently, the Committee decides to proceed to consider the merits of the communication.

Consideration of the merits

12.1 The Human Rights Committee has considered the present communication in the light of all the information made available to it by the parties, as provided in article 5, paragraph 1, of the Optional Protocol.

12.2 Concerning the alleged violation of article 7, the Committee understands the anguish and psychological pressure which Ms. Sankara and her sons, the family of a man killed in disputed circumstances, have suffered and continue to suffer because they still do not know the circumstances surrounding the death of Thomas Sankara, or the precise location where his remains were officially buried.[33] Thomas Sankara's family have the right to know the circumstances of his death,[34] and the Committee points out that any complaint relating to acts prohibited under article 7 of the Covenant must be investigated rapidly and impartially by the competent authorities.[35] In addition, the Committee notes, as it did during its deliberations on admissibility, the failure to correct Thomas Sankara's death certificate of 17 January 1988, which records a natural death contrary to the publicly known facts, which have been confirmed by the State party. The Committee considers that the refusal to conduct an investigation into the death of Thomas Sankara, the lack of official recognition of his place of burial and the failure to correct the death certificate constitute inhuman treatment of Ms. Sankara and her sons, in breach of article 7 of the Covenant.

12.3 Concerning the alleged violation of article 9, paragraph 1, of the Covenant, the Committee recalls its jurisprudence to the effect that the right to security of person guaranteed in article 9, paragraph 1, of the Covenant applies even outside the context of formal deprivation of liberty.[36] The interpretation of article 9 does not allow a State party to ignore threats to the personal security of non-detained persons within its jurisdiction.[37] In the present case, individuals shot and killed Thomas Sankara on 15 October 1987, and, fearing for their safety, his wife and children left Burkina Faso shortly thereafter. However, the arguments put forward by the authors are not sufficient to reveal a violation of article 9, paragraph 1, of the Covenant.

12.4 Concerning the alleged violation of article 14, paragraph 1, of the Covenant, while the authors' request for public inquiry and legal proceedings do not need to be determined by a court or tribunal, the Committee considers however that whenever, as in the present case, a judicial body is entrusted with the task of deciding on the start of such inquiry and proceedings, it must respect the guarantee of equality of all persons before the courts and tribunals as enshrined in article 14, paragraph 1, and the principles of impartiality, fairness and equality of arms implicit in this guarantee.[38]

12.5 The Committee notes the authors' arguments regarding the non-respect of the guarantee of equality by the Supreme Court when it rejected the appeal on the grounds of failure to deposit security of 5,000 CFA francs, and its refusal to take into account Auguste Sankara's status as a minor. It appears, firstly, that the State party did not contest the claim that, contrary to article 110 of order No. 91-51 of 26 August 1991, the registrar failed to inform counsel of the obligation to deposit the sum of 5,000 CFA francs as security; and secondly, that the Supreme Court ruling stating that the authors provided no evidence in support of an exemption for Auguste Sankara, as a minor, was unwarranted since the authors were unaware that security was required precisely because of the registrar's failure to inform them of the fact - a key point of which the Court was fully aware. The Committee accordingly considers that the Supreme Court failed to comply with the obligation to respect the guarantee of equality of all persons before the courts and tribunals as enshrined in article 14, paragraph 1, of the Covenant and the principles of impartiality, fairness and equality of arms implicit in this guarantee.

12.6 The Committee notes that after the Supreme Court adopted decision No. 46 of 19 June 2001, confirming decision No. 14 in which the Appeal Court declared the ordinary courts incompetent, the relevant authorities refused or omitted to refer the case to the Minister of Defence so that proceedings could be instituted in the military courts in accordance with article 71 (1) and (3) of the Code of Military Justice. The Committee also refers to its deliberations on admissibility and the conclusion it reached that the Procurator wrongly halted the proceedings instituted by the authors and in addition failed to respond to their appeal of 25 July 2001. Lastly, the Committee notes that after the ordinary courts were declared incompetent, almost five years passed, but no judicial proceedings were instituted by the Minister of Defence. The State party was unable to explain these delays, and on this point the Committee considers that, contrary to the State party's arguments, no time bar could invalidate proceedings in a military court, and consequently the failure to refer the matter to the Minister of Defence should be attributed to the Procurator, who alone had the power to do so. The Committee considers that this inaction since 2001, despite the various remedies sought subsequently by the authors, constitutes a violation of the obligation to respect the guarantee of equality of all persons before the courts and tribunals as enshrined in article 14, paragraph 1, and the principles of impartiality, fairness and equality of arms implicit in this guarantee.

12.7 Concerning the alleged violation of article 26 of the Covenant, the Committee considers that the arguments put forward by the authors concerning the authorities' discrimination against them for their political opinions are insufficient to reveal a violation.

13. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol, is of the view that the facts before it disclose a violation of articles 7 and 14, paragraph 1, of the Covenant.

14. The Committee recalls that in acceding to the Optional Protocol, the State party recognized the competence of the Committee to determine whether the Covenant had been breached and that, under article 2 of the Covenant, it undertook to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the Covenant, and to guarantee an effective and enforceable remedy when a violation has been established. Under article 2, paragraph 3 (a), of the Covenant, the State party is required to provide Ms. Sankara and her sons an effective and enforceable remedy in the form, inter alia, of official recognition of the place where Thomas Sankara is buried, and compensation for the anguish suffered by the family. The State party is also required to prevent such violations from occurring in the future.

15. Bearing in mind that, by acceding to the Optional Protocol, States parties recognize the competence of the Committee to determine whether there has been a violation of the Covenant, and that, under article 2 of the Covenant, they undertake to ensure to all individuals within their territory and subject to their jurisdiction the rights recognized in the Covenant, and to guarantee an effective and enforceable remedy when a violation has been established, the Committee wishes to receive from the State party, within 90 days following the submission of these Views, information about the measures taken to give effect to them. The State party is also requested to publish the Committee's Views.

[Adopted in English, French and Spanish, the French text being the original version. Subsequently to be issued in Arabic, Chinese and Russian as part of the Committee's annual report to the General Assembly.]

Notes

[1] The examining judge considered that, in accordance with article 51 of the Code of Criminal Procedure, the examination division of the Ouagadougou Tribunal de Grande Instance had jurisdiction in the light of the location of the crime and the fact that it was not time-barred. "[…] Considering that, in the present case, it was not reported that the crime of premeditated murder in question had taken place in a military establishment; that even if this were true, it should be noted that the perpetrator or perpetrators of this crime have not been identified to date; that this, moreover, is the reason why the complaint was lodged against a person or persons unknown; that consequently, in the present circumstances, it would be very hazardous, without having previously identified the perpetrators, to conclude that they were members of the armed forces; that even if the person responsible for issuing a false administrative document had military status, it should be pointed out that this second offence is subsidiarily linked to the first, namely premeditated murder, in the sense that its existence depends on the existence of the first, which is the principal offence; that, moreover, it is a general principle of law that the accessory follows

the principal […]; that it follows that the military status of the person responsible for the false document could not serve as legal justification for the referral of the perpetrator or perpetrators of the principal offence, namely premeditated murder, to the military courts […]."

[2] "[…] it is no secret that the events on which the complaint is based took place on the evening of 15 October 1987 in the Conseil de l'Entente barracks. In other words, the acts in question were perpetrated not only in a military establishment, but also by persons with military status. In no respect does this involve an ordinary offence. The false document mentioned in the complaint is an accessory following the principal, the outcome of which is linked to the principal action. Therefore: The indictment division is requested to declare the examining judge incompetent, in accordance with article 34 of the Code of Military Justice […]". Article 34 of the Code of Military Justice: "The military courts are competent to examine and pass judgement on ordinary offences committed by members of the armed forces, or equivalent non-combatant personnel in service, in military establishments or where they are accommodated, as well as the military offences established under this Code in accordance with the rules of procedure which apply thereto […]."

[3] It emerges from the Supreme Court decision that the authors stated in the Court that, at the time they lodged their complaint on 9 October 1997, pursuant to article 85 of the Code of Criminal Procedure, they had paid to the examining judge a bond of 1 million CFA francs, and that, furthermore, they had not paid the security to the Supreme Court registrar as the latter had omitted to read out the provisions of article 110 of order No. 91-0051/PRES of 26 August 1991 relating to the composition, organization and functioning of the Supreme Court ("the plaintiff is required, on pain of inadmissibility, to pay a sum of 5,000 francs as security before the end of the month following his or her notice of intent to appeal. The security is payable either directly to the chief registrar of the Supreme Court or by a money order addressed to the chief registrar. The registrar receiving the notice of intent shall read out to the plaintiffs the provisions of the foregoing two paragraphs and mention this formality in the record"). The Supreme Court considered that the deposits of security provided for under article 85 of the Code of Criminal Procedure and article 110 of the above-mentioned order were separate, and that the payment of the security provided for in the first provision did not obviate payment of that required under the second provision. The Supreme Court also considered that in failing to inform the plaintiffs of the obligation to pay security the registrar was not, in law, liable to any procedural penalty, and that the authors could not, therefore, be exempted from this obligation as a result of the aforesaid omission.

[4] Arguing that Court of Appeal decision No. 14 had become final as a result of Supreme Court decision No. 46 and that consequently the ordinary courts were incompetent, the authors, on the strength of article 71 (3) of the Code of Military Justice, asked the Prosecutor-General to report the criminal act to the Minister of Defence, who would then be required to issue a prosecution order (article 71: "If the case involves an offence within the competence of the military courts, the Minister of Defence shall determine whether or not it is necessary to refer the case to the military justice system. No proceedings may take place, on pain of invalidity, without a prosecution order issued by the Minister of Defence. In all cases where the offence has been reported by a civilian examining judge, a Procurator of Faso or a Procurator General, the Minister of Defence is required to issue the prosecution order. The said prosecution order cannot be appealed; it must make specific reference to the acts to

which the proceedings will relate, characterize them and indicate the applicable legislation"). The authors recalled that, on 27 January 2000, they had also, unsuccessfully, addressed such a request to the Procurator of Faso. However, according to the authors, in a similar case (*Public Prosecutor v. Kafando Marcel et al.*, which was the subject of referral order No. 005/TMO/CCI of 17 July 2000), the Procurator of Faso in the Ouagadougou Tribunal de Grande Instance had, in communication No. 744/99, reported to the Government Commissioner to the Military Court acts categorized as serious and ordinary offences that appeared to have been committed on Conseil de l'Entente premises. Moreover, according to the authors, the Minister of Defence, after a preliminary inquiry, had issued a prosecution order.

[5] "It's all very well to keep harping on one particular aspect of the Sankara case. But it should not be forgotten that there are certainly many cases before the courts. The Minister of Defence is not there to deal with justice-related issues; he certainly has other concerns. But I can assure you that, in all matters relating to all legal cases, there will be nothing to prevent cases from proceeding from start to finish in our country. We have chosen the rule of law and we intend to meet our responsibilities in this regard."

[6] The authors claim, first, that the statute of limitations was interrupted (neither the judicial examination order nor the Court of Appeal decision challenged the admissibility of the complaint. Similarly, the predecessor of the current Procurator of Faso had not invoked the statute of limitations, but article 34 of the Code of Military Justice. Lastly, the Supreme Court's decision on inadmissibility applies only to the non-payment of security and not to the statute of limitations). Secondly, the authors claim that the Court of Appeal decision instructed the parties, not only the claimant but also the prosecuting authorities, to take proceedings in another court. In accordance with this decision, the authors explain that they were unable, under the provisions of the Code of Military Justice, to bring the case directly before the Minister of Defence (who is the only person with authority to issue the prosecution order in connection with an offence within the jurisdiction of the military courts), and were thus obliged to refer the case to the Procurator in accordance with article 71 (3) of the Code of Military Justice. Once again, reference is made to the *Public Prosecutor v. Kafando Marcel et al.* case.

[7] Article 4: "Any judge who, invoking the silence, obscurity or inadequacy of the law, refuses to deliver a judgement may be prosecuted for denial of justice."

[8] Article 166: "Any judge who, on whatever pretext, including the silence or obscurity of the law, refuses to render the justice he owes to the parties after being requested to do so, and who persists in his refusal after a warning or order from his superiors, shall be liable to imprisonment for a term of two months to one year and a fine of 50,000 to 300,000 francs. A judge found guilty of this offence may, furthermore, be barred from any judicial function for a period of not more than five years."

[9] Communication No. 886/1999, *Schedko et al. v. Belarus*, Views of 3 April 2003.

[10] Article 111 of order No. 91-0051/PRES of 26 August 1991: "The following are nevertheless exempted from payment of a bond: persons sentenced to ordinary imprisonment or light imprisonment; persons who are in receipt of, or have requested, legal aid; minors under the age of 18."

[11] Equivalent to approximately 7.6 euros, according to the authors.

[12] Communications Nos. 563/1993, *Nydia Bautista de Arellana v. Colombia*, Views of 27 October 1995, 612/1995, *Vicente v. Colombia*, Views of 29 July 1997, and 778/1997, *Coronel v. Colombia*, Views of 24 October 2002.

[13] Communication No. 612/1995, *Vicente v. Colombia*, Views of 29 July 1997.

[14] Communication No. 886/1999, *Schedko et al. v. Belarus*, Views of 3 April 2003.

[15] Communication No. 30/1978, *Bleier v. Uruguay*, Views of 29 March 1982.

[16] "At this juncture, matters must not be confused. To date, the Minister of Defence has not been called upon to intervene as such in the Thomas Sankara case. I have no judicial document or a document from a claimant calling on me to act. If one day this problem arises, courageously and with the President of Burkina Faso as the supreme chief of the armed forces, we shall ensure that a solution is found to the problem. Thomas Sankara was in fact one of our brothers in arms. There is no reason why any problem raised concerning him cannot be solved." *Le Pays*, No. 2,493, 22 October 2001.

[17] Communication No. 345/1998, *R.A.V.N. et al. v. Argentina*, decision of 26 March 1990 on inadmissibility.

[18] Communications Nos. 24/1997, *S. Lovelace v. Canada*, Views of 30 July 1981, 196/1985, *I. Gueye v. France*, Views of 3 April 1989, 516/1992, *J. Simunek et al. v. Czech Republic*, Views of 19 July 1995, 520/1992, *E. and A.K. v. Hungary*, decision of 7 April 1994 on inadmissibility, and 566/1993, *Ivan Somers v. Hungary*, Views of 23 July 1996.

[19] Communication No. 612/1995, *Vicente v. Colombia*, Views of 29 July 1997.

[20] Médiateur du Faso, Collège des sages, National Reconciliation Commission, and Compensation Fund for Victims of Political Violence.

[21] Communication No. 612/1995, *Vicente v. Colombia*, Views of 29 July 1997.

[22] Communications Nos. 612/1995, *Vicente v. Colombia*, Views of 29 July 1997, and 778/1997, *Coronel et al. v. Colombia*, Views of 24 October 2002.

[23] Communications Nos. 950/2000, *Sarma v. Sri Lanka*, Views of 16 July 2003, and 886/1999, *Schedko v. Belarus*, Views of 3 April 2003.

[24] Communication No. 821/1998, *Chongwe v. Zambia*, Views of 25 October 2000.

[25] As an example, the State party mentions a bond in the amount of 1.5 million CFA francs deposited in the case *Fonds Chrétien de l'Enfance Canada (FCC) v. Batiano Célestin* in 1997.

[26] Under articles 648-658 of the Code of Criminal Procedure and articles 291 and 292 of order No. 91-51 of 26 August 1991 on the organization and functioning of the Supreme Court,

any party in court proceedings who entertains legitimate suspicions regarding a judge who is to rule on his or her interests may prevent the judge from doing so by applying for disqualification. However, according to the State party, the author did not make use of this opportunity. Nor did she make use of the appeal against judicial misconduct provided for in articles 283 and 284 of order No. 91-51, under which denial of justice may be punished.

[27] The authors cite communications Nos. 161/1983, *Herrera Rubio v. Colombia*, Views of 2 November 1987, and 778/1997, *Coronel et al. v. Colombia*, Views of 24 October 2002.

[28] The authors refer to communications Nos. 1024/2001, *Sanlés Sanlés v. Spain*, decision of 30 March 2004 on inadmissibility, and 717/1996, *Acuña Inostroza et al. v. Chile*, decision of 23 July 1999 on inadmissibility, and to the individual opinions on communication No. 718/1996, *Vargas Vargas v. Chile*, decision of 26 July 1999 on inadmissibility.

[29] Communication No. 718/1996, *Vargas Vargas v. Chile*, decision of 26 July 1999 on inadmissibility, para. 6.7.

[30] Communication No. 493/1992, *Griffin v. Spain*, Views of 4 April 1995: "… unless it can be ascertained that the proceedings were manifestly arbitrary, that there were procedural irregularities amounting to a denial of justice, or that the judge manifestly violated his obligation of impartiality" [para. 9.6].

[31] Communication No. 811/1998, *Mulai v. Republic of Guyana*, Views of 20 July 2004: "where attempts at jury tampering come to the knowledge of either of the parties, these alleged improprieties should have been challenged before the court" [para. 6.1].

[32] "In criminal matters, prosecution is time-barred 10 years after the date on which the offence was committed, if no act of investigation or prosecution has taken place in that interval. If such acts have taken place during that interval, prosecution shall be time-barred only 10 years after the latest such act. The same applies even to persons who were not affected by the act of investigation or prosecution."

[33] Communications Nos. 886/1999, *Schedko v. Belarus*, Views of 3 April 2003, para. 10.2, and 887/1999, *Staselovich v. Belarus*, Views of 3 April 2003, para. 9.2.

[34] Communication No. 107/1981, *Quinteros v. Uruguay*, Views of 21 July 1983, para. 14.

[35] General comment No. 20, para. 14.

[36] Communications Nos. 195/1985, *Delgado Páez v. Colombia*, Views of 12 July 1990, para. 5.5, and 711/1996, *Carlos Dias v. Angola*, Views of 20 March 2000, para. 8.3.

[37] Communications Nos. 821/1998, *Chongwe v. Zambia*, Views of 25 October 2000, para. 5.3, and 468/1991, *Bahamonde v. Equatorial Guinea*, Views of 20 October 1993, para. 9.2.

[38] Communication No. 1015/2001, *Perterer v. Austria*, decision of 20 July 2004 on inadmissibility, para. 9.2.

GG. Communication No. 1164/2003, *Castell Ruiz et al v. Spain* (Views adopted on 17 March 2006, eighty-sixth session)*

Submitted by:	Daniel Abad Castell-Ruiz, Fernando Elcarte Revestido, Jesús Alfaro Baztan, Higinio Ayala Palacios, Javier Casanova Aldave, Juan Bautista Castro Muñoz, Enrique de los Arcos Lage, Gabriel Delgado Bona, Leónides Del Prado Boillos, Manuel García del Moral Payueta, José Iglesias Marchite, José A. Janin Mendia, Jesús López Lasa, Mariano Martínez Vergara, Mirentxu Oyarzabal Irigoyen, Tomás Tinture Eguren (represented by counsel)
Alleged victims:	The authors
State party:	Spain
Date of communication:	21 October 2002 (initial submission)
Subject matter:	Difference in remuneration, in the form of a special allowance, for doctors under exclusive contract to the Navarra Health Service and for doctors who, in addition to providing services in the public sector, also have private practices
Procedural issues:	Abuse of the right to submit communications; incompatibility with the provisions of the Covenant
Substantive issues:	Equality before the law; equal protection under the law; non-discrimination
Article of the Covenant:	26
Article of the Optional Protocol:	3

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 17 March 2006,

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* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Nisuke Ando, Mr. Prafullachandra Natwarlal Bhagwati, Ms. Christine Chanet, Mr. Maurice Glèlè Ahanhanzo, Mr. Edwin Johnson, Mr. Walter Kälin, Mr. Ahmed Tawfik Khalil, Mr. Rajsoomer Lallah, Mr. Michael O'Flaherty, Ms. Elisabeth Palm, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Ivan Shearer, Mr. Hipólito Solari-Yrigoyen, Ms. Ruth Wedgwood and Mr. Roman Wieruszewski.

Having concluded its consideration of communication No. 1164/2003, submitted on behalf of Daniel Abad Castell-Ruiz, Fernando Elcarte Revestido, Jesús Alfaro Baztan, Higinio Ayala Palacios, Javier Casanova Aldave, Juan Bautista Castro Muñoz, Enrique de los Arcos Lage, Gabriel Delgado Bona, Leónides Del Prado Boillos, Manuel García del Moral Payueta, José Iglesias Marchite, José A. Janin Mendia, Jesús López Lasa, Mariano Martínez Vergara, Mirentxu Oyarzabal Irigoyen and Tomás Tinture Eguren, under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the authors of the communication and the State party,

Adopts the following:

Views under article 5, paragraph 4, of the Optional Protocol

1. The authors of the communication, dated 21 October 2002, are Daniel Abad Castell-Ruiz, Fernando Elcarte Revestido, Jesús Alfaro Baztan, Higinio Ayala Palacios, Javier Casanova Aldave, Juan Bautista Castro Muñoz, Enrique de los Arcos Lage, Gabriel Delgado Bona, Leónides Del Prado Boillos, Manuel García del Moral Payueta, José Iglesias Marchite, José A. Janin Mendia, Jesús López Lasa, Mariano Martínez Vergara, Mirentxu Oyarzabal Irigoyen and Tomás Tinture Eguren. All are Spanish nationals and medical doctors who work for the Navarra Health Service and at the same time run private practices. They claim to be victims of a violation of article 26 of the Covenant by Spain. The Optional Protocol entered into force for the State party on 25 April 1985. The authors are represented by counsel.

Factual background

2.1 The authors of the communication work as medical doctors in the Navarra Health Service (Osasunbidea), under the legal regime covering "statute personnel" and administrative and general service staff. In addition to this work in the public sector, they also run private medical practices.

2.2 The authors state that the law governing the personnel of the Navarra Health Service (hereinafter "the Service") sets the levels of remuneration to which the Service's doctors are entitled. In addition to their basic salary, Service staff are entitled to additional allowances, one of which is known as the "special allowance". The law provides that staff in receipt of a special allowance equivalent to 45 per cent or more of their basic salary must provide t[illegible] services on an exclusive basis, i.e. they must be fully available and totally committed, and may not engage in any other paid work in either the public or the private sector, with certain exceptions. Staff who, like the authors, receive a special allowance of less than 45 per cent of the basic salary are not under exclusive contract and may practise medicine privately.

2.3 The authors consider that they have suffered discrimination because the special allowance they receive is less than that received by staff under exclusive contract even though, they allege, they do the same work as the doctors under exclusive contract, with the same working hours (8 a.m. to 3 p.m.) and the same responsibilities and obligations.

2.4 In order to show that they have the same working conditions as the doctors under exclusive contract, the authors provide two certificates from the heads of personnel of two

Navarra Health Service hospitals. According to these certificates, the authors have the same working hours and schedule and the same responsibilities as doctors under exclusive contract. They also provide a copy of a judgement handed down by Pamplona employment tribunal No. 3 on 2 January 1999, which declared proven in the proceedings brought by the authors in the domestic courts of the State party that "the complainants' working year and schedule are the same as those of the other doctors ... working under exclusive contract ... and, in the performance of their duties, they have the same responsibility as doctors in the same occupational group, position and workplace who work under exclusive contract".

2.5 Two of the authors lodged a complaint with the Managing Director of the Navarra Health Service, but this was rejected in decision No. 565/98 of 13 May 1998. They appealed this decision in Pamplona employment tribunal No. 3, which rejected it in a ruling of 2 January 1999. The tribunal held that to accept the authors' contention would be to grant equal treatment in dissimilar situations, since the authors had not chosen to practise medicine exclusively in the public sector.

2.6 The authors filed an appeal against that ruling in the Navarra High Court of Justice. The High Court rejected the appeal on 14 May 1999, finding, as the tribunal had, that the authors themselves had voluntarily placed themselves in a situation of inequality vis-à-vis the doctors under exclusive contract. The authors filed an appeal in cassation for unification of doctrine before the Supreme Court, whose Employment Division dismissed it on 25 October 2000. They then filed an application for *amparo* against the ruling in question with the Constitutional Court, which rejected it on 8 April 2002. The other authors filed a complaint with the Director of Administration and Human Resources of the Navarra Health Service, but this was rejected in decision No. 949/97 of 29 December 1997. They filed an ordinary appeal against that decision, which was rejected in a Navarrese Government decision of 15 June 1998. That decision was appealed in the Navarra High Court of Justice and rejected by the Administrative Division in a ruling of 22 March 2001. That ruling was appealed in the First Division of the Constitutional Court and rejected in a judgement dated 8 April 2002.

The complaint

3.1 The authors allege a violation of article 26 of the Covenant. Referring to the Committee's general comment No. 18, they point out that when legislation is adopted by a State party it must comply with the requirement of article 26 that its content should not be discriminatory. They add that the principle of non-discrimination is not limited to the rights provided for in the Covenant. They argue that not all differential treatment constitutes discrimination, only such differential treatment as cannot be justified on reasonable and objective grounds, and they point out that, as stated in their communication, the Navarra Health Service has created two distinct categories of doctor that are paid different salaries despite the fact that there is no difference in the work done by the two groups.

3.2 The authors maintain that there are no objective and reasonable grounds for the difference in the way the two categories of doctor are treated, and they examine the arguments advanced by the domestic courts to justify this differential treatment.

(a) Origin of the exclusive contract

The authors explain that the legal regime governing the right to receive remuneration in the form of a special allowance has its origins in the 1987 doctors' strike. The Government offered the doctors' unions a pay rise for those doctors who worked solely for the Government and not in private clinics or consultancies. This offer was accepted and enshrined in a National Health Institute decision dated 25 April 1988, containing a Council of Ministers decision stipulating that the special allowance would be paid for not working in the private sector and for providing the services associated with a single post in government service. According to the authors, this rule resulted in discrimination against doctors working in certain areas of the private sector and that, to head off any challenge on grounds of unconstitutionality for violating the principle of non-discrimination, a Royal Decree was also passed (No. 3/87 of 12 September 1987) regulating the special allowance in more general terms. According to this decree, the allowance was intended as compensation for specific characteristics of certain posts, such as special technical difficulty, commitment, responsibility, or dangerous or heavy work. However, the authors claim that the special allowance from the beginning was linked to the fact that the doctors who received it worked exclusively in government service.

(b) Optional nature of the exclusive contract

The domestic courts which ruled on the authors' case argued that the situations of the two categories of doctor were different because the authors had not opted to practise medicine exclusively within the public sector. In the authors' view, this argument does not amount to objective and reasonable grounds, for if the special allowance is paid on grounds of exclusivity there is no reason why the law should view work such as university teaching, but not work in a private medical practice, as compatible with the full-time regime. The authors submit that the argument used by the domestic courts to justify differential treatment was not so much the notion of exclusivity as the assumption that the doctors who work in the private sector earn more than those employed on an exclusive basis.

(c) Voluntary nature of the contract

Another argument put forward by the domestic courts to justify the differential treatment was that the authors themselves opted for an unequal and, for them, more advantageous position in relation to the doctors under exclusive contract, in that they are able to practise private medicine. The authors maintain that the fact that they freely chose to practise private medicine does not mean there was no discrimination. In their view, this freedom of choice is only relative, since doctors who opt to work in the private sector will be paid less than medical colleagues who work exclusively for the Government, simply because they have chosen to spend their free time on an activity that the Government does not consider compatible with the exclusive regime, whereas a doctor who decides to work as a university teacher is entitled to the same salary as a doctor under exclusive contract.

(d) Availability

According to the Constitutional Court, the differential treatment is not discriminatory because the doctors under exclusive contract must be available whenever they are needed by the Service, and because this kind of working relationship is the most appropriate for health-care institutions. The authors do not see this argument as objective or reasonable either, having demonstrated to the domestic courts - and the courts having concurred - that both categories of doctor do the same work. The doctors under exclusive contract are not required to work longer hours than their standard working day. If the Service so requires, it may call on any of its doctors, whether or not they are under exclusive contract, to serve special duty, i.e. to extend their working day to meet the needs of the Service. The authors cite the judgement handed down by Pamplona employment tribunal No. 3, which acknowledges that doctors under exclusive contract are not required to work any overtime that is not considered as special duty. The theoretical possibility that the Service might assign certain duties to doctors under exclusive contract cannot, in the authors' view, constitute reasonable grounds for differential treatment.

(e) The exclusive contract is the most appropriate for public health-care institutions

The authors do not agree with this argument, which was advanced by the Constitutional Court to justify differential treatment for doctors under exclusive contract. The authors argue that this would make sense if such doctors did nothing else apart from their work with the Service, but in fact they are allowed to do other work such as teaching. The authors further argue that, if the Government believes the exclusive contract to be the most appropriate for health-care institutions, it should not impose it at the expense of a particular category of doctors who are paid less for doing the same work as other doctors.

3.3 The authors submit that, in admitting certain kinds of work as compatible with the exclusive regime, the Service is recognizing that that regime is based on the activities performed by doctors after working hours, and not on their availability for work in the Service.

State party's observations on admissibility and on the merits

4.1 By note verbale dated 22 April 2003, the State party argues that the communication is inadmissible under article 3 of the Optional Protocol on the grounds that accepting the authors' claim would be tantamount to discriminating against the doctors under exclusive contract, who would be paid the same as the authors despite their different - and more demanding - working conditions and regime. As such an outcome would lead to inequality, it would be unreasonable and incompatible with the provisions of the Covenant.

4.2 In the State party's view, the difference in treatment is established in Navarrese Autonomous Community Act No. 11/92, of 20 October 1992, by which the special allowance is reserved for doctors under exclusive contract, in accordance with a voluntary regime which the law seeks to promote because full availability and total commitment are deemed beneficial to Navarra's public health system. The authors of the communication preferred not to opt for an exclusive contract and to continue with their private practices instead. It is not only the Navarra Health Service which views private professional activities as incompatible with public service; this rule applies across the board in government service in Spain, except in respect of part-time teaching, which is exempt. Incompatibility is a well-established concept enshrined notably in the 1984 law on incompatibility, whose own rationale is indisputable, aiming as it does to ensure the greatest commitment in the performance of public service. In the State party's view, it is perfectly legitimate for the law to attempt to ensure that public services are performed under optimum conditions by establishing pay differentials to reflect exclusivity.

4.3 The State party believes it is obvious - and indeed the authors acknowledge - that the regime of those doctors who receive a higher special allowance is different from that of the authors, since they accept a greater degree of commitment and availability than the authors do. While the doctors under exclusive contract may not earn income from similar private occupations and may be obliged to work any additional hours required by the Service, the authors cannot be held to the exclusive employment rule or compelled to work overtime even if required by the Service. Since the two situations are not the same, it would violate the equal treatment principle for the remuneration to be the same in both cases.

4.4 In the State party's view, the equal treatment principle is not applicable to dissimilar situations if there is good reason for different treatment. The State party cites the ruling by the Spanish Constitutional Court, which holds that no violation of the equal pay principle can be found in the authors' case on the grounds that: (a) the situations of the two categories of doctor are different, given that the authors' income derives from both public and private sources while the doctors under exclusive contract are paid solely from public funds; (b) the higher special allowance is intended as compensation not only for work actually done but also for certain other factors of undoubted economic value, such as full availability and total commitment, which mean that the Navarra Health Service may if necessary require the doctors under exclusive contract to work overtime; (c) the provision of a special allowance for their exclusive commitment is reasonably justified inasmuch as that commitment is most likely to stimulate the staff's interest in, identification with and involvement in health-care institutions; (d) the authors were free to opt for an exclusive or non-exclusive contract and were aware of the consequences of their choice; (e) the authors are at liberty to opt for the alternative regime; and (f) what is not compatible with the equal-treatment principle is that doctors who are not under exclusive contract should seek the advantages enjoyed by those who are, but without suffering the same disadvantages.

4.5 The State party submitted its arguments on the merits by note verbale dated 2 August 2004. It argues that, for discrimination to exist, those affected must be in similar situations and yet be treated differently. The State party reiterates that the authors' situation is different from that of the doctors under exclusive contract. It recalls that the difference stems from an individual act of free will on the part of each doctor, a decision that may be taken either when the doctor joins the Navarra Health Service or in the course of his or her employment there. In the State party's view, the fact that it was an act of free will that gave rise to the different situation rules out any possibility of discrimination. In that regard it cites the Navarra High Court of Justice ruling, according to which: "The authors themselves have voluntarily opted for a different situation from that of the doctors they compare themselves with, a situation which, in the Court's view, is more advantageous since in addition to their work in the public sector they may also practise private medicine."

4.6 The State party rejects the authors' assertion that their situation is the same as that of the doctors under exclusive contract, arguing that they are confusing the different legal situations of the two categories of doctor with their effects in practice. The normal working day of either group of doctors is one thing, but the fact that one group of doctors has opted to practise medicine exclusively for the Navarra Health Service and is entirely at its disposition and totally committed to it is another. These doctors may be required to work additional hours to meet the exigencies of the Service, which does not mean that they actually work such hours in practice. De jure and de facto availability is the key to the difference in remuneration.

4.7 According to the State party, the legal regime applicable to the doctors under exclusive contract to the Navarra Health Service is no different from the legal regime applicable to Spanish government employees in general. According to Spanish law, public servants under exclusive contract may not engage in any other paid work, with the exception on a limited basis of certain kinds of teaching or research work, which are not considered prejudicial to availability for or commitment to full-time work in the public sector. In the State party's view, therefore, there is no merit to the authors' allegation that their situation is comparable to whatever teaching or research activity may be undertaken by doctors under exclusive contract.

4.8 In conclusion, the State party considers that, far from giving rise to discrimination, its legislation has protected the principle of equal treatment, and that to accept the authors' contention would be to give rise to discrimination against the doctors under exclusive contract to the Navarra Health Service, who, despite the more demanding nature of their conditions of work and legal regime, would receive the same remuneration as the authors, in violation of the principle of equal treatment established in article 26 of the Covenant.

Comments by the authors on the State party's observations

5.1 In a letter dated 8 November 2004, the authors reiterate that both categories of doctor do the same work and have the same working hours and the same responsibilities. In the authors' view, the fact that the exclusive regime is voluntary does not change the discriminatory nature of the differential treatment. They argue that, while it is true that doctors may choose which regime to work under, the basis for that choice is discriminatory since those doctors who practise private medicine can never be admitted to the exclusive regime, whereas those who work as university teachers, even in private institutions, can. As to availability, the authors repeat that it is a criterion devoid of substance either in law or in practice. The doctors under exclusive contract are not obliged to work additional hours unless they are considered as special duty. Although it is true that the Navarra Health Service may require overtime to be worked, in practice all doctors are offered overtime, which is voluntary and subject to a supplementary productivity allowance for both categories of doctor.

5.2 The authors note that their complaint concerns not the theoretical framework of the special allowance but the way it is applied in practice, which is wrong and discriminatory. They argue that a number of the State party's autonomous communities have begun to question the discriminatory manner in which the special allowance is applied and have decided to extend it to all doctors, regardless of the regime they work under. After remaining in effect for 20 years and having been originally introduced to meet the demands of various doctors' unions and the Government's wish to prioritize public over private medicine, the special allowance has been reduced for certain doctors on account of their private activities. In practice, all the doctors, whether or not they are under exclusive contract, do the same work, have the same duty rota and the same responsibilities, and are equally at the disposal of their institution. The discrimination lies in the fact that those doctors who run private practices are paid less and the special allowance is now used as a method of penalizing them. It has been proved that there is no difference between the two categories of doctor in respect of availability. Moreover, the authors reiterate, the special allowance does not preclude the doctors under exclusive contract from doing other paid work, since it allows university teaching, research and the administration of a family business. Such activities are conducted during the doctor's working hours and thus limit his or her commitment and availability. All the special allowance does is to exclude the practice of private medicine, which unfairly impairs individuals' freedom to dispose of their free time as they wish and discriminates against those doctors who choose to practise private medicine in their free time. The authors also point out that the possibility that the Navarra Health Service might require the doctors under exclusive contract to work overtime has never materialized in practice, and would in any case constitute a breach of the State party's labour standards, under which working weeks in excess of 48 hours, overtime included, are prohibited.

Issues and proceedings before the Committee

Consideration of admissibility

6.1 In accordance with rule 93 of its rules of procedure, before considering any claims contained in a communication, the Human Rights Committee must decide whether the communication is admissible under the Optional Protocol to the Covenant.

6.2 The Committee has ascertained that the same matter is not being examined under another procedure of international investigation or settlement for the purposes of article 5, paragraph 2 (a), of the Optional Protocol. Moreover, the Committee notes that the State party has not adduced any argument to the effect that domestic remedies have not been exhausted and consequently finds that the provisions of article 5, paragraph 2 (b), of the Optional Protocol do not preclude its consideration of the complaint.

6.3 The Committee takes note of the State party's argument to the effect that the communication is inadmissible under article 3 of the Optional Protocol on the grounds that accepting the authors' claim would be tantamount to discriminating against the doctors under exclusive contract, who would be paid the same as the authors despite their different - and more demanding - working conditions and regime, and that, since such an outcome would lead to inequality, it would be unreasonable and incompatible with the provisions of the Covenant. The Committee nevertheless finds that the authors' claims raise issues that warrant consideration on the merits.

6.4 Accordingly, the Committee finds that the communication is admissible and proceeds to a consideration on the merits.

Consideration on the merits

7.1 Turning to the substance of the communication, the Committee refers to its jurisprudence, according to which a difference in treatment under the law that acts to an individual's detriment and is not based on reasonable and objective grounds may constitute a violation of article 26. The Committee takes note of the authors' argument that the law on the special allowance is applied arbitrarily in their case despite the fact that their situation is the same as that of the doctors under exclusive contract, inasmuch as both categories of doctor have the same working hours and the same responsibilities. The Committee further notes that the State party rejects the authors' assertion.

7.2 In the Committee's view, determining whether the situations of the doctors in the two categories are de facto the same or different basically requires assessing the facts, which is a matter for the domestic courts. In this regard, the Committee notes from the documentation submitted by the authors that Navarra-Pamplona employment tribunal No. 3, the Navarra High Court of Justice and the Constitutional Court all found that the situations of the two categories of doctor are not exactly equivalent. In the Committee's opinion, the dossier does not reveal that the authors are in a situation that is de facto similar to that of the doctors under exclusive contract and that would justify their argument that they are entitled to equal remuneration.

7.3 The Committee further notes that admission to the exclusive regime or the regime the authors belong to depends entirely on the wishes of the individual doctor and is a choice that may be made upon entry to government service or at any time thereafter. Consequently, the Committee finds that the authors have not been subjected to discriminatory treatment in accordance with any of the individual attributes set forth in article 26 of the Covenant.

8. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts as submitted by the authors do not disclose a violation of article 26 of the Covenant.

[Adopted in English, French and Spanish, the Spanish text being the original version. Subsequently to be issued in Arabic, Chinese and Russian as part of the Committee's annual report to the General Assembly.]

HH. Communication No. 1177/2003, *Wenga and Shandwe v. DRC* (Views adopted on 17 March 2006, eighty-sixth session)*

Submitted by:	Willy Wenga Ilombe and Nsii Luanda Shandwe (represented by counsel)
Alleged victims:	The authors
State party:	Democratic Republic of the Congo
Date of communication:	10 April 2003 (initial submission)
Subject matter:	Arbitrary detention - right to be brought promptly before a judge - compensation for arbitrary detention
Procedural issues:	State party's failure to cooperate
Substantive issues:	Arrest and detention of two human rights defenders
Articles of the Covenant:	9, paragraphs 1 to 5; 14
Articles of the Optional Protocol:	2 and 4, paragraph 2

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 17 March 2006,

Having concluded its consideration of communication No. 1177/2003, submitted to the Human Rights Committee by Willy Wenga Ilombe and Nsii Luanda Shandwe under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the authors of the communication and the State party,

Adopts the following:

Views under article 5, paragraph 4, of the Optional Protocol

1. The authors of the communication are Willy Wenga Ilombe and Nsii Luanda Shandwe, citizens of the Democratic Republic of the Congo. They claim to be victims of violations by the

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* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Nisuke Ando, Mr. Prafullachandra Natwarlal Bhagwati, Ms. Christine Chanet, Mr. Maurice Glèlè Ahanhanzo, Mr. Edwin Johnson, Mr. Walter Kälin, Mr. Ahmed Tawfik Khalil, Mr. Rajsoomer Lallah, Mr. Michael O'Flaherty, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Ivan Shearer, Mr. Hipólito Solari-Yrigoyen, Ms. Ruth Wedgwood and Mr. Roman Wieruszewski.

Democratic Republic of the Congo of paragraphs 2 to 5 of article 9, and of article 14 of the International Covenant on Civil and Political Rights. The case also appears to raise issues under article 9, paragraph 1, of the Covenant. The authors are represented by counsel. The Optional Protocol came into force for the Democratic Republic of the Congo on 1 November 1976.

Factual background

2.1 On 20 February 2002, Willy Wenga Ilombe, a lawyer and member of the African Centre for Peace, Democracy and Human Rights (ACPD), a human rights non-governmental organization, was arrested. He was taken to the Office of the Public Prosecutor of the Military Court (*Parquet Général près la Cour d'Ordre Militaire*). After 48 hours in detention, he was informed that he had been arrested for breach of State security. According to the Office of the Public Prosecutor, he had been in constant contact with Major Bora Uzima Kamwanya in January 2001. Major Bora is suspected to have taken part in the assassination of the former President of the Democratic Republic of the Congo, Laurent-Désiré Kabila, on 16 January 2001. It was claimed that the Major's telephone number appeared twice on the telephone bill of Willy Wenga Ilombe.

2.2 On 19 April 2002, Nsii Luanda Shandwe, president of the Committee of Human Rights Observers (CODHO), a human rights non-governmental organization, was also arrested. After seven days in detention at the Office of the Public Prosecutor of the Military Court, he was transferred to the Penitentiary and Re-education Centre of Kinshasa. He was accused of providing accommodation to Michel Bisimwa, a student suspected of spying for Rwanda. As a result, he was accused of breach of State security and spying for a foreign power.

2.3 On 27 January 2003, the authors were released after 9 and 11 months of detention, respectively, without ever being tried by a court.

The complaint

3.1 The authors allege a violation of article 9, paragraph 2, arguing that at the time of their arrest for breach of State security, they were neither informed, nor received notification of the charges made against them. They argue that according to the jurisprudence of the Committee, it is not sufficient to inform the person who is detained that he was arrested on the basis of security measures without any indication of the substance of the complaint against him.[1] Moreover, they suggest that the concept of "national security" should be clearly defined by law, that police and security officers should be required to state in writing why a person has been arrested, and that such information should be made available to the public and should be reviewable by the courts.[2]

3.2 They also claim a violation of article 9, paragraph 3, because they were not brought before a competent judge, nor tried, during the time of their detention, and were detained for 9 and 11 months, respectively. They invoke a decision of the Committee in which a delay of one week was found to be a breach of article 9, paragraph 3,[3] as well as a judgement of the European Court of Human Rights in which a delay of four days and six hours was considered to be excessive.[4] In the present case, the authors remained in detention until 27 January 2003, without being brought before a judge or being granted bail. Their release was not decided according to the applicable rules of criminal procedure, as there was no judicial decision acquitting them, nor a decision to grant them bail. Their release appears to have resulted from international and national public pressure. The authors were simply taken from their cells and told to go home. This form of release creates insecurity for the authors, since they can be re-arrested at any time. At the time of their release, the public prosecutor told the authors that the investigation was still under way, that they could thus be called upon at any time and that they should not leave the area.

3.3 The authors claim a violation of article 9, paragraph 4, because they were deprived of the right to take proceedings before a court, in order that the court may decide without delay on the legality of their detention. They refer to the "décret-loi" of 23 August 1997 creating a military court in the Democratic Republic of the Congo (Cour d'Ordre Militaire), and in particular to article 5 which provides that the decisions of this court can neither be opposed, nor appealed against, except in an extraordinary procedure before the President of the Republic by way of a presidential pardon.

3.4 They finally claim a violation of article 14, because they were arrested and detained by the Office of the Public Prosecutor of a special military court ("juridiction militaire d'exception") created to deal exclusively with crimes committed by the military.

3.5 Since the authors consider themselves victims of arbitrary and unlawful detention, they request the Committee to order compensation for the harm they have suffered.

3.6 With regard to the exhaustion of domestic remedies, the authors argue that there are no remedies available for the violations they claim. They refer to article 200 of the Code of Military Justice, which confers on the Military Prosecutor the power to "decide to extend the detention for one month and then month after month, for as long as required by public interest". As mentioned above, it is not possible to appeal the decisions of the military court, except in an extraordinary procedure before the President of the Republic. The authors had requested several times to be released on bail or brought before a competent judge.

3.7 The Committee considers that the authors' allegations also raise issues under article 9, paragraph 1, of the Covenant.

State party's failure to cooperate

4. On 23 May 2003, 14 January and 23 September 2004, and 16 June 2005, the State party was requested to submit to the Committee information on the admissibility and the merits of the communication. The Committee notes that this information has not been received. The Committee regrets the State party's failure to provide any information with regard to admissibility or the substance of the authors' claims. It recalls that under the Optional Protocol, the State party concerned is required to submit to the Committee written explanations or statements clarifying the matter and the remedy, if any, that it may have provided. In the absence of a reply from the State party, due weight must be given to the authors' allegations, to the extent that these have been properly substantiated.

Issues and proceedings before the Committee

Consideration of admissibility

5.1 Before considering any claim contained in a communication, the Human Rights Committee must, in accordance with rule 93 of its rules and procedures, decide whether or not it is admissible under the Optional Protocol to the Covenant.

5.2 The Committee has ascertained that the same matter is not being examined under another procedure of international investigation or settlement for the purposes of article 5, paragraph 2 (a), of the Optional Protocol.

5.3 In light of the authors' arguments concerning the exhaustion of domestic remedies and the lack of cooperation from the State party, the Committee considers that the provisions of article 5, paragraph 2 (b), of the Optional Protocol do not preclude the examination of the communication.

5.4 With regard to article 14, the Committee considers that the authors have not sufficiently substantiated for the purposes of admissibility what specific charges, if any, fell to be determined in accordance with paragraph 1 thereof. This part of the communication is therefore inadmissible under article 2 of the Optional Protocol.

5.5 The Committee considers that, in the absence of any information from the State party, the complaints of violations of article 9, paragraphs 2 to 4, as well as issues arising under article 9, paragraph 1, are admissible.

Consideration of the merits

6.1 The Human Rights Committee has considered the present communication in the light of all the information made available to it, as provided for in article 5, paragraph 1, of the Optional Protocol.

6.2 With regard to the alleged violation of article 9, paragraph 2, the Committee takes note of the authors' claim that they were not informed, at the time of arrest, of the reasons for their arrest. It observes that it was not sufficient simply to inform the authors that they were being arrested for breach of State security, without any indication of the substance of the complaint against them.[5] In the absence of any pertinent information from the State party which would contradict the authors' allegations, the Committee considers that the facts before it reveal a violation of article 9, paragraph 2, of the Covenant.

6.3 As to the alleged violation of article 9, paragraph 3, the Committee takes note of the authors' claim that they were detained for 9 and 11 months, respectively, without ever being brought before a judge. It recalls that article 9, paragraph 3, provides that anyone arrested or detained on a criminal charge has to be brought promptly before a judge or other officer authorized by law to exercise judicial power, and that pursuant to general comment No. 8 (16), such delays must not exceed a few days. In the absence of any reply from the State party which would challenge the authors' allegations, the Committee concludes that the facts as submitted reveal a violation of article 9, paragraph 3, of the Covenant.

6.4 On the alleged violation of article 9, paragraph 4, of the Covenant, the Committee takes note of the authors' claim that they were deprived of the right to challenge the legality of their detention, because decisions of the Military Court can neither be opposed, nor appealed. In the absence of any information from the State party on this issue, the Committee considers that the facts before it reveal a violation of article 9, paragraph 4, of the Covenant.

6.5 In general, the detention of civilians by order of a military court for months on end without possibility of challenge must be characterized as arbitrary detention within the meaning of article 9, paragraph 1, of the Covenant.

7. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts before it reveal violations by the State party of article 9, paragraphs 1 to 4, of the Covenant.

8. In accordance with article 2, paragraph 3, of the Covenant, the State party is under an obligation to provide the authors with an effective remedy, including appropriate compensation. The State party is also under an obligation to take measures to prevent similar violations in the future.

9. Bearing in mind that, by becoming a party to the Optional Protocol, the State party has recognized the competence of the Committee to determine whether there has been a violation of the Covenant or not and that, pursuant to article 2 of the Covenant, that State party has undertaken to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the Covenant and to provide an effective and enforceable remedy in case a violation has been established, the Committee wishes to receive from the State party, within 90 days, information about the measures taken to give effect to the Committee's Views. The State party is also requested to publish the Committee's Views.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the Committee's annual report to the General Assembly.]

Notes

[1] See communication No. 43/1979, *Drescher Caldas v. Uruguay*, Views adopted on 21 July 1983, para. 13.2.

[2] See concluding observations of the Human Rights Committee: Sudan, CCPR/C/79/Add.85, 19 November 1997, para. 13.

[3] See communication No. 702/1996, *McLawrence v. Jamaica*, Views adopted on 18 July 1997, para. 5.6.

[4] See *Brogan and others v. United Kingdom*, judgement of 29 November 1984, Series A No. 145-B, para. 62.

[5] See also communication No. 43/1979, *Drescher Caldas v. Uruguay*, Views adopted on 21 July 1983, para. 13.2.

II. Communication No. 1180/2003, *Bodrozič v. Serbia & Montenegro* (Views adopted on 31 October 2005, eighty-fifth session)*

Submitted by:	Mr. Zeljko Bodrožić (represented by counsel, Mr. Biljana Kovacevic-Vuco)
Alleged victim:	The author
State party:	Serbia and Montenegro
Date of communication:	11 May 2003 (initial submission)
Subject matter:	Conviction of journalist for criminal insult concerning media article on a political figure
Substantive issues:	Freedom of expression - limitations necessary to protect rights and reputation of others
Procedural issues:	None
Article of the Covenant:	19
Articles of the Optional Protocol:	None

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 31 October 2005,

Having concluded its consideration of communication No. 1180/2003, submitted to the Human Rights Committee on behalf of Mr. Zeljko Bodrožić under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the author of the communication, and the State party,

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* The following members of the Committee participated in the examination of the present communication: Mr. Nisuke Ando, Mr. Prafullachandra Natwarlal Bhagwati, Mr. Alfredo Castillero Hoyos, Ms. Christine Chanet, Mr. Maurice Glèlè Ahanhanzo, Mr. Walter Kälin, Mr. Ahmed Tawfik Khalil, Mr. Michael O'Flaherty, Ms. Elisabeth Palm, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Ivan Shearer, Mr. Hipólito Solari-Yrigoyen, Ms. Ruth Wedgwood and Mr. Roman Wieruszewski.

Adopts the following:

Views under article 5, paragraph 4, of the Optional Protocol

1. The author of the communication, initially dated 11 May 2003, Zeljko Bodrožić, a Yugoslav national born on 16 March 1970. He claims to be a victim of a breach by Serbia and Montenegro of his rights under article 19 of the Covenant. He is represented by counsel. The Optional Protocol entered into force for the State party on 6 December 2001.

Factual background

2.1 The author is a well-known journalist and magazine editor. In a magazine article published on 11 January 2002 entitled "Born for Reforms", the author politically criticized a number of individuals, including a Mr. Segrt. At the time the article was published, Mr. Segrt was manager of the "Toza Mrakovic" factory in Kikinda, and previously had been a prominent member of the Socialist Party of Serbia, including leader of the party group in the federal Yugoslav Parliament in 2001. Inter alia, the article stated:

> "After he squandered away 'Toza's' millions on the [Socialist Party of Serbia] and [Yugoslav Left] campaign and other party pastimes; after being cooed 'my friend Dmitar' by Sloba [Milosevic] before he was sent off to The Hague prison; after he organized the protests with Seselj against the 'caging' of comrade Sloba; after the glitzy party moments in the first half of 2001 (he became the Socialist Party leader in the Federal Parliament and one of the Party's toplevel officials ...); after he realized that the times of fun and games were over, he decided to 'give his party the finger' and become 'the great advocate' of the reforms undertaken by the government of the comrade - oops, the Chancellor, Mr. Djindjic."
>
> The article also labeled Mr. Segrt 'another former bolsterer of Sloba [Milosevic]' and 'the manager from Plava Banja, also known as Dmitar Segrt'."

2.2 On 21 January 2002, Mr. Segrt filed private criminal complaints of libel and insult against the author in the Kikinda Municipal Court, on the basis of the above extracts.[1] On 14 May 2002, the court convicted the author of criminal insult, but acquitted him on the charge of libel. It dismissed the libel charge on the basis that the factual aspects of the extracts in question were, in fact, true and correct. As to the charge of insult, the Court found that the extracts were "actually abusive" and "inflict[ed] damage to the honour and reputation of the private plaintiff". Rather than constituting, as argued by the author, "serious journalistic comment in which he used sarcasm", the Court considered that the words used "are not the expressions that would be used in serious criticism; on the contrary, these are generally accepted words that cause derision and belittling by the social environment". In the Court's view the use of slang words and emphasized quotations, rather than "a literary language that would be appropriate for such a criticism", showed that the expressions employed "were used with the intention to belittle the private plaintiff and expose him to ridicule, and therefore this and such an act of his, though it was done within the performance of the journalist profession, is indeed a criminal offence [of insult]".

For the conviction of criminal insult, the Court sentenced the author to a fine of 10,000 Yugoslav dinars and costs.

2.3 On 20 November 2002, the Zrenjanin District Court dismissed the author's appeal against conviction. The Court considered that taken as a whole the article had an insulting character, giving particular weight to the use of the words "squandered", "give his party the finger" and "cooed". As part of the appeal, the author had also referred to previous speeches by Mr. Segrt in political speeches said to amount to hate speech, in which he labeled democratic opposition inter alia "traitors", "fascists" and "extended hand of NATO". The Court observed that while earlier speeches by Mr. Segrt could be "subjected to criticism and analysis", they "cannot be used for belittling and insulting [him], since dignity and honour of a man cannot be taken from anybody". On the contrary, the author could have asked for judicial protection if he had felt insulted by these speeches.

2.4 In the author's view, the appellate decision concluded the ordinary criminal process. On 30 December 2002, the author asked the Republic Prosecutor to file an extraordinary "request for the protection of legality" in the Supreme Court, but on 24 February 2003 the Prosecutor denied this request. With this, all domestic remedies are said to have been exhausted.

The complaint

3.1 The author alleges that his criminal conviction for the political article published violates his right under article 19 to freedom of expression. The author refers to the Committee's general comment No. 10 on this issue as well as the jurisprudence of the European Court of Human Rights (*Handyside v. United Kingdom,*[2] *Lingens v. Austria,*[3] *Oberschlik v. Austria,*[4] *Schwabe v. Austria*[5]), the Inter-American Commission on Human Rights in Report 22/94 on Argentinian "*destacato*" laws and the United States Supreme Court (*New York Times Co v. Sullivan*[6] and *United States v. Dennis*[7]). From these authorities, the author derives his claim that article 19 of the Covenant protects a broad area of expression, especially in political debate, and limits on this expression should be tightly construed in order to avoid chilling legitimate expression.

3.2 In addition, the author argues that the appeal court's suggestion that he should have sought judicial protection against Mr. Segrt's earlier speeches from the courts during the Milosevic era, when Mr. Segrt held a high position, is wholly unrealistic (see paragraph 2.3, supra). As a result, the author contends that his conviction and sentence, as well as the existence of criminal offences of libel and insult in the State party's law, violate his rights under article 19 of the Covenant.

3.3 In consequence, the author seeks a declaration of violation of article 19, and recommendations that the State party decriminalizes "libel" and "insult", that it dismisses the criminal verdict against him and removes it from its records, that it compensates him for wrongful conviction, that it reimburses the fine and costs he was sentenced to pay, and that he be compensated for his costs before the domestic courts and the Committee.

State party's submissions on admissibility and merits and author's comments

4. By note verbale of 23 May 2005, the State party commented on the admissibility and merits of the communication, observing that the conviction for insult under article 93, paragraph 2, of the Criminal Code of the Republic of Serbia, upheld on appeal, were the result of legally valid judgements. It further points out that upon review of the case, the Office of the Public Prosecutor of the Republic of Serbia established that the request for legality protection with respect to these judgements was unfounded.

5. By letter of 25 July 2005, the author reiterated his earlier submissions, arguing that the State party's submissions implicitly confirm that domestic remedies had been exhausted.

Issues and proceedings before the Committee

Consideration of admissibility

6.1 Before considering any claim contained in a communication, the Human Rights Committee must, in accordance with rule 93 of its rules of procedure, decide whether or not the communication is admissible under the Optional Protocol to the Covenant.

6.2 The Committee has ascertained that the same matter is not being examined under another procedure of international investigation or settlement for the purposes of article 5, paragraph 2 (a), of the Optional Protocol.

6.3 As to the specific claims arising out of the author's conviction and sentence, the Committee does not construe the State party's submission of 23 May 2005 as raising an objection to the contention that domestic remedies have been exhausted, or to any other aspect of the admissibility of the communication, save substantiation for purposes of admissibility of the claims. In the Committee's view, however, the specific claims advanced by the author have been sufficiently advanced in fact and law so as to be substantiated, for purposes of admissibility. It therefore considers the communication to be admissible inasmuch as these claims raise issues under article 19 of the Covenant.

Consideration of the merits

7.1 The Human Rights Committee has considered the present communication in the light of all the information made available to it by the parties, as provided in article 5, paragraph 1 of the Optional Protocol.

7.2 The question before the Committee is whether the author's conviction for criminal insult for the article published by him in January 2002 amounts to a breach of the right to freedom of expression, including the right to impart information, guaranteed in article 19, paragraph 2, of the Covenant. The Committee recalls that article 19, paragraph 3, permits restrictions on freedom of expression, if they are provided by law and necessary for respect of the rights or reputations of others. In the present case, the Committee observes that the State party has advanced no justification that the prosecution and conviction of the author on charges of criminal insult were necessary for the protection of the rights and reputation of Mr. Segrt. Given the factual elements found by the Court concerning the article on Mr. Segrt, then a prominent public and political figure, it is difficult for the Committee to discern how the expression of opinion by the author, in the manner he did, as to the import of these facts amounted to an unjustified infringement of Mr. Segrt's rights and reputation, much less one calling for the application of criminal sanction. The Committee observes, moreover, that in circumstances of public debate in a democratic society, especially in the media, concerning figures in the political domain, the value placed by the Covenant upon uninhibited expression is particularly high.[8] It follows that the author's conviction and sentence in the present case amounted to a violation of article 19, paragraph 2, of the Covenant.

8. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts before it disclose a violation of article 19, paragraph 2, of the Covenant in respect of the author.

9. In accordance with article 2, paragraph 3 (a), of the Covenant, the State party is under an obligation to provide the author with an effective remedy, including quashing of the conviction, restitution of the fine imposed on and paid by the author as well as restitution of court expenses paid by him, and compensation for the breach of his Covenant right.

10. Bearing in mind that, by becoming a State party to the Optional Protocol, the State party has recognized the competence of the Committee to determine whether there has been a violation of the Covenant or not and that, pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the Covenant, the Committee wishes to receive from the State party, within 90 days, information about the measures taken to give effect to its Views. The State party is also requested to publish the Committee's Views.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the Committee's annual report to the General Assembly.]

Notes

[1] Article 92 of the Criminal Code of the Republic of Serbia criminalizes the conduct of anyone who "discloses or circulates any untrue material about a person, which can harm that person's honour or reputation", while article 93, paragraph 2, of the Code does likewise for "anyone who insults another".

[2] A 24 (1976) at para. 49.

[3] A 103 (1986) at para. 42.

[4] Reports 1997-IV at para. 34.

[5] A 242-B (1992) Com Rep at para. 55.

[6] 376 US 254 (1964).

[7] 341 US 494 (1951), opinion of Douglas J.

[8] See, inter alia, *Aduayom et al. v. Togo* case No. 422-424/1990, Views adopted on 12 July 1996, at para. 7.4: "[T]he freedoms of information and of expression are cornerstones in any free and democratic society. It is the essence of such societies that its citizens must be allowed to inform themselves about alternatives to the political system/parties in power, and that they may criticise or openly and publicly evaluate their Governments without fear of interference or punishment."

JJ. Communication No. 1184/2003, *Brough v. Australia* (Views adopted on 17 March 2006, eighty-sixth session)*

Submitted by:	Corey Brough (represented by counsel)
Alleged victim:	The author
State party:	Australia
Date of communication:	4 March 2003 (initial submission)
Subject matter:	Alleged ill-treatment and inhuman conditions of detention of juvenile Aboriginal detainee
Procedural issues:	Substantiation of claims - admissibility *ratione materiae* - exhaustion of domestic remedies
Substantive issues:	Freedom from torture or cruel, inhuman or degrading treatment or punishment - right of persons deprived of their liberty to be treated with humanity and with respect for their dignity - right to effective remedy
Articles of the Covenant:	2 (3), 7 and 10 and 24 (1)
Articles of the Optional Protocol:	2, 3 and 5 (2) (b)

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 17 March 2006,

Having concluded its consideration of communication No. 1184/2003, submitted to the Human Rights Committee on behalf of Corey Brough under the Optional Protocol to the International Covenant on Civil and Political Rights,

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* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Nisuke Ando, Mr. Prafullachandra Natwarlal Bhagwati, Ms. Christine Chanet, Mr. Maurice Glèlè Ahanhanzo, Mr. Edwin Johnson, Mr. Walter Kälin, Mr. Ahmed Tawfik Khalil, Mr. Rajsoomer Lallah, Mr. Michael O'Flaherty, Ms. Elisabeth Palm, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Hipólito Solari-Yrigoyen, Ms. Ruth Wedgwood and Mr. Roman Wieruszewski.

Pursuant to rule 90 of the Committee's rules of procedure, Committee member Mr. Ivan Shearer did not participate in the adoption of the present decision.

Having taken into account all written information made available to it by the author of the communication, and the State party,

Adopts the following:

Views under article 5, paragraph 4, of the Optional Protocol

1. The author of the communication is Mr. Corey Brough, an Australian citizen, born on 22 April 1982, currently residing in Australia. He claims to be a victim of a violation by Australia[1] of articles 7, 10 and article 2, paragraph 3, of the Covenant. Although not specifically invoked by the author, the communication also seems to raise issues under article 24, paragraph 1, of the Covenant. The author is represented by counsel, Mrs. Michelle Hannon.

Factual background

2.1 The author is an Aboriginal. He suffers from a mild mental disability, with significant impairments of his adaptive behaviour, his communication skills and his cognitive functioning.[2]

2.2 On 12 February 1999, the author was detained in Kariong Juvenile Detention Centre, due to the revocation of his parole order. On 5 March 1999, the Bidura Children's Court convicted him of burglary, assault and causing bodily harm, and sentenced him to 8 months imprisonment. On 21 March 1999, the author participated in a riot at Kariong, to draw attention to "the mistreatment and brutalisation by Kariong staff". During that riot, one prison staff was taken hostage by the author.

2.3 On 22 March 1999, the Director General of the Department of Juvenile Justice applied to the Gosford Children's Court for the author to be referred to an adult correctional facility, pursuant to section 28 (A)[3] of the Children (Detention Centres) Act 1987. This was granted by the Court, and the author was transferred to Parklea Correctional Centre, where he was placed in the clinic. He protested against his transfer to an adult prison and asked for a return to a juvenile detention facility.

2.4 On arrival at Parklea, the author was segregated from other inmates, under section 22 (1) of the New South Wales Correction Centres Act 1952, on the ground that his association with other inmates constituted a threat to the personal safety of inmates and to the security of the Correctional Centre.

2.5 During an assessment of his psycho-medical condition, the author stated that he had no reservations against being placed in an adult facility. Although he was not at risk of self-harm, according to the records, he was placed in a "safe cell" (a facility for inmates who are at risk of self-harm)[4] in a segregation area, to protect him from other prisoners.

2.6 The author soon experienced difficulty in coping with long periods of being locked in the safe cell. On 30 March 1999, a first instance of self harm was recorded. The author told a prison officer that "if I don't get out of here, there will be another black death" (meaning suicide of an Aboriginal).

2.7 On 1 April 1999, after breaking a plate and shredding his mattress with a broken fragment, the author was moved from his safe cell to a "dry cell",[5] where he was confined for 48 hours.

2.8 On 7 April 1999, the author was observed obscuring one of the surveillance cameras. Officers came to his cell to remove all items that could be used to obscure the camera lenses and, when he refused to take off his clothes, they allegedly assaulted him below the rib area and removed his clothes except his underwear. The officers' report on the incident reveals that four officers used reasonable force to restrain the author, who kicked one of the officers in the head during the struggle. He was allegedly confined to his cell for 72 hours, with lights on day and night. On 9 April, the author's pillow and blanket were returned to him.

2.9 On 13 April 1999, the author attempted to break his cell lights to scratch the lens of a surveillance camera. There was a scuffle between the author and six to eight officers, resulting in minor injuries sustained by both the author and the officers.

2.10 On 15 April 1999, the author was placed in a dry cell, while the lights and camera in his safe cell were being repaired. The records indicate that he was returned to his safe cell that day. In the afternoon, he was allowed out of his cell for half an hour of exercise. When asked to return to his safe cell, he refused and a minimum amount of force was used to secure him. His clothes were removed and he was left with his underwear. Later, he was observed trying to hang himself with a noose made out of his underwear. Officers entered the cell and, when the author resisted, forcibly removed the noose. The Inmate Discipline Action Form of 17 April 1999 indicates that the author pleaded guilty to a charge of failing to comply with a reasonable order, and that he was sentenced to confinement to his cell for 48 hours.

2.11 The author was administered anti-psychotic medication ("Largactil"), without it being clear whether his condition had been assessed prior to the prescription of the drug. On 16 April 1999, the general practitioner at Parklea prescribed 50 mg of "Largactil" for the author each day until he could be examined by a psychiatrist. This treatment continued after the examination took place.

2.12 L. P., a caseworker of the Aboriginal Deaths in Custody Watch Committee, who visited the author several times in March and April 1999, reportedly observed that he was anxious, nervous, and insufficiently equipped with clothes and blankets to protect him from the cold.

2.13 New segregation orders were issued on 15 and 28 April 1999, on the ground that the author's association with other inmates constituted a threat to the personal safety of the staff and to the order and discipline within the Correctional Centre.

2.14 A psychiatric assessment of the author dated 16 April 2002 states: "Unfortunately, Mr. Brough was not able to provide me with a history which in my view was determinative of [...] any emotional reaction which could be described as post traumatic following a period of about a month being isolated under 24 hour bright lights."

The complaint

3.1 The author claims that he is a victim of violations of articles 2, paragraph 3, 7, 10 and, implicitly, of article 24, paragraph 1, of the Covenant, as he was transferred to an adult correctional facility despite his age, as the conditions of his detention at Parklea Correctional Centre amounted to cruel, degrading and inhuman treatment, and since he did not have access to an effective remedy. He alleges that his transfer to an adult institution violated article 10, paragraphs 2 (b) and 3, of the Covenant, since having regard to his age, disability and status as an Aboriginal, he was placed in a particularly vulnerable position which required special care and attention.

3.2 As regards the conditions of his detention, the author argues that the Committee found violations of article 7 and/or article 10 of the Covenant in what he considers to be similar cases.[6]

3.3 The author claims that his segregation and confinement for 72 and 48 hours, respectively, as punishment for his conduct, the absence of facilities in his cell, the lack of appropriate heating, the removal of his blanket and clothes, his camera surveillance and 24 hour exposure to artificial light, the use of force causing him physical injuries, and the prescription of medication without his free consent were unnecessary to ensure his safety or to secure order in the detention centre. The cumulative effect of these measures amounted to a violation of article 7, read in conjunction with article 10, of the Covenant.

3.4 By reference to a 1991 report of the Royal Commission into Aboriginal Deaths in Custody, the author submits that Aboriginal people are over-represented in the New South Wales prisons and that segregation, isolation and restriction of movement within prisons have more deleterious effects on Aboriginal than on other inmates, given the importance they attach to a high degree of mobility and to access to their family and community.

3.5 The author claims that he still suffers from the effects of his confinement in the safe cell. He sometimes wakes up sweating with his heart racing and experiences panic attacks when he is alone in his cell.

3.6 The author submits that article 2, paragraph 3, of the Covenant creates a substantive right which can be relied upon independently of other Covenant rights. The State party's failure to provide him with an effective remedy to secure his rights under articles 7 and 10 of the Covenant thus amounted to a violation of article 2, paragraph 3. In support, the author refers to the Committee's concluding observations on the State party's third and fourth periodic reports, in which it expressed its concern that "[t]here are still areas in which the domestic legal system does not provide an effective remedy to persons whose rights under the Covenant have been violated".[7]

3.7 The author argues that, in the absence of available effective domestic remedies, he cannot be expected to pursue futile claims.[8] In accordance with the Committee's jurisprudence,[9] victims depending on legal aid are not obliged to bring a complaint before superior courts in order to satisfy the requirement in article 5, paragraph 2 (b), if they have been advised that no reasonable prospects of appeal exist. The author submits that legal aid is no longer available to him.

3.8 The author notes that remedies to challenge prison discipline decisions are limited under Australian law. Common law remedies, such as duty of care on the part of custodial authorities, false imprisonment or habeas corpus, provide very limited relief for inmates who wish to challenge their conditions of detention. Judicial review is unavailable in cases where the nature of the conduct in question is administrative or managerial, rather than punitive or judicial.[10]

3.9 Although specific guarantees for prisoners exist in New South Wales under the Crimes (Administration of Sentences) Act 1999 and the Crimes (Correctional Centres Routine) Regulation 1995, complaints under these provisions can only be brought to the Minister or

Commissioner, but not in a court of law. A complaint to the Minister would not provide the author with an enforceable right to compensation or any other form of relief and cannot, therefore, be considered an effective remedy.

3.10 As regards the complaint procedure under the Human Rights and Equal Opportunity Commission Act 1986 (Cth), the author states that this procedure applies only to acts or practices of the Commonwealth and not to acts of the New South Wales prison staff. The author also submits a report dated 7 May 2002 by a specialist on personal injury law, which states that he could not successfully make a claim in negligence, based on his treatment at Parklea.

State party's observations on admissibility and merits

4.1 On 3 May 2004, the State party challenged the admissibility and, subsidiarily, the merits of the communication, arguing that the author has failed to exhaust domestic remedies, that his communication is an abuse of the right of submission, that his allegations are unsubstantiated, incompatible with the provisions of the Covenant, and without merit.

4.2 On the facts, the State party submits that it has no record of the alleged incident of 1 April 1999. However, a very similar incident occurred on 13 April 1999, when the author was observed tearing his mattress and smashing his mug and cell light. He assaulted an officer who had entered to remove the items and was subsequently charged with assault and sentenced to two months imprisonment. The records for 14 April 1999 note that the author had insinuated that he would harm himself if he remained in such conditions.

4.3 The State party describes the events following 28 April 1999 as follows:
On 11 May 1999, the author assaulted correctional officers while being strip-searched before being brought to court. On 17 May 1999, the Bidura Childrens' Court sentenced him to two two-month prison terms for assault and failure to appear in court. On 8 June 1999, he was released from Parklea and transferred to Minda Juvenile Justice Centre. He tried to escape from custody while at Bidura Children's Court on 17 October 1999. On 26 February 2000, he was transferred to Kariong High Security Unit after refusing to attend his trial for armed robbery. On 28 February 2000, the Director-General of the Department of Juvenile Justice requested the Bidura Children's Court to issue an order under section 28 (A) of the Children (Detention Centres) Act 1987, to keep the author in prison until completion of his trial. This application was initially refused, but a fresh application was granted by the Wyong Children's Court on 10 March 2000. The author committed further suicide attempts. At the time of submission of the State party's observations, he served a sentence for armed robbery.

4.4 On admissibility, the State party argues that the author has not substantiated any failure by the Australian authorities to treat him with humanity and with respect for his dignity. His claims under articles 7 and 10 are therefore unsubstantiated under article 2 and inadmissible *ratione materiae* under article 3 of the Optional Protocol.

4.5 For the State party, the author did not substantiate his claim under article 2, paragraph 3, of the Covenant, for purposes of admissibility, as he could have complained to the prison management at Parklea, the Minister or Commissioner for Corrective Services and the New South Wales Ombudsman, or to domestic courts about his treatment in prison. By reference to the Committee's jurisprudence[11] and to the wording of article 2, paragraph 3, the State party argues that due to its accessory character, its free-standing invocation by the author is inadmissible *ratione materiae* under article 3 of the Optional Protocol. Even if he based his claim on article 2, paragraph 3, read together with articles 7 and 10, it would have to be rejected because of the inadmissibility of his claims under articles 7 and 10 of the Covenant.[12]

4.6 While conceding that the author was unable to access the Human Rights and Equal Opportunity Commission, the State party reiterates that other effective remedies were available to him, i.e. a complaint to the Minister or the Commissioner for Corrective Services, to Official Visitors appointed by the Minister for Corrective Services, with wide powers to address problems, and to the Inspector-General of Corrective Services, or an application for review of segregation or protective custody exceeding 14 days by the Serious Offenders Review Council.[13] The latter may order the suspension of the segregation or protective custody or the removal of the inmate to a different correctional centre.[14] These remedies are consistent with international standards, such as article 36 of the Standard Minimum Rules for the Treatment of Prisoners and Principles 33 (1) and (4) of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment. As such, they must be exhausted before a complaint can be brought before a judicial authority.

4.7 Regarding judicial remedies, the State party refers to recent jurisprudence that courts may examine purely administrative decisions by prison authorities, but that they will not interfere if the decisions are found to have been bona fide, if they have no punitive character, and if they are a reasonable use of the power of management.[15] Prisoners subject to unlawful treatment may seek relief like any other person aggrieved by action of a public official. Whether the author could have produced sufficient evidence for an action for breach of duty of care by a prison officer or Governor,[16] who may only be sued for damages if his action was both malicious and without reasonable and probable cause, was doubtful in view of the considerable evidence from various prison officers, welfare officers, medical officers and nurses. However, lack of evidence on the author's part was immaterial to the question of whether effective remedies were available.[17]

4.8 For the State party, the author could have filed a complaint with the NSW Ombudsman, who can investigate a complaint and send a report and recommendations to the principal officer of the appropriate authority.

4.9 The State party disputes that the author's treatment amounts to torture or cruel, inhuman or degrading treatment or punishment within the meaning of article 7 and 10, paragraph 1, arguing that he was not subjected to any particular hardship beyond what is strictly unavoidable in a closed environment.[18] He failed to demonstrate any physical or mental harm sustained by him, in the absence of evidence of injuries or of a direct link between his emotional state and his confinement to a safe cell.[19] Rather than being punitive, the measures imposed on him sought to protect him from further self-harm, to protect other prisoners, and to maintain the security of the correctional facility. They were proportionate and consistent with articles 7 and 10 of the Covenant, with applicable domestic law and with the Standard Minimum Rules for the Treatment of Prisoners and the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment:

(a) The author's segregation and confinement to a safe cell was an inevitable security precaution, given that he had been involved in a riot at Kariong,[20] and fell short of solitary confinement within the meaning of clause 171[21] of the 1995 Crimes (Correctional Centres Routine) Regulation; it was in conformity with the NSW Department of Corrective Services Operational Procedures Manual,[22] since the author was provided with daily exercise, food and water, and access to an Aboriginal delegate;

(b) The temporary removal of the author's clothes, blanket and pillow and the camera surveillance in his cell were necessary to observe and protect him from further self-harm. He was not exposed to the cold; his cell was sufficiently heated;

(c) There is no record of the use of lights for periods of more than 24 hours. Parklea officers may have considered the use of lights necessary to monitor the author, after he had tried to obscure the camera lenses in his cell;

(d) Physical force was used by officers on 7 and 15 April 1999, but only after the author had refused to comply with their orders, and was restricted to the minimum extent necessary, as reflected by the reported absence of injuries;

(e) The prescription of "Largactil" was intended to control the author's self-destructive behaviour; he later consented to the use of this medication;

(f) There is no record of the author being confined for 72 hours as of 7 April 1999. Rather, Parklea Clinical records indicate that he attended a case management meeting on 9 April 1999. Similarly, there is no record that he was subject solitary confinement in a dry cell for 48 hours on 1 April 1999, or on 13 April 1999, when another incident occurred.

Author's comments

5.1 On 30 July 2004, the author commented on the State party's observations. He maintains that the measures imposed on him were disproportionate to the aim of protecting him, considering his age, disability and his Aboriginal status:

(a) The removal of his clothes was humiliating and degrading and subjected him to excessive cold, as his cell was not properly heated. The fact that his clothes had been removed, on 15 April 1999, before he had tried to hang himself with a noose made out of his underwear showed that such removal was not intended to protect him from self-harm, but rather to punish him for his refusal to return to his cell. Parklea psychological assessments indicated that he was not suicidal but experiencing difficulty in coping with confinement conditions;

(b) For the author, the absence of evidence for the continued use of lights in his cell does not rebut his claim. The fact that the State party could not exclude that the lights had been used for observation purposes showed that it did not fully investigate the claim. Such use was unnecessary, given his constant video surveillance; it was a punitive measure to cause humiliation and sleep deprivation;

(c) The author disputes the absence of records of injuries sustained by him. The NSW Health Department Incident/Assault Report confirmed small lacerations to his middle back and a laceration to the little finger of his right hand as a result of the incident of 13 April 1999.

There were also records of bruises on his head, allegedly resulting from the incident on 11 May 1999, when he had assaulted two officers while being strip-searched;

(d) The author submits that he consented to the continued use of "Largactil" because he had been told that he would only be let out of the safe cell if he agreed to take the prescribed medicine;

(e) With regard to the State party's contention that no record exists of the alleged incident of 1 April 1999, or his subsequent confinement for 48 hours and for 72 hours on 7 April 1999, respectively, the author refers to the prison officer's report dated 1 April 1999, stating the he broke a dinner plate and used a fragment to cut the mattress, as well as to the Prison's Inmate Discipline Action Forms dated 4 and 11 April 1999, recording that he pleaded guilty to the charge of failing to comply with prison routine on 1 April 1999 and was confined to his cell for 48 hours, and that he pleaded guilty to the charge of assaulting a prison officer on 7 April 1999 and was confined to his cell for 72 hours as punishment.

5.2 On the issue of exhaustion of domestic remedies, the author reiterates that administrative[23] and judicial remedies available to him would be ineffective. While complaints within the prison are received by the prison governor, the very person who authorized his conditions of detention, complaints to the Ombudsman could only result in the adoption of a report or recommendation to the Government, without providing any enforceable right or recourse. The *travaux préparatoires* of article 2, paragraph 3 (b), of the Covenant indicate the drafters' intention that States parties should progressively develop judicial remedies. More than 20 years after ratification of the Covenant in 1980, Australia should have complied with this obligation.

5.3 The author argues that the State party failed to rebut the expert advice he produced on the limited availability of civil remedies submitted by him. Legal action based on a breach of duty of care, under section 263, paragraphs 1 and 2, of the Crimes (Administration of Sentences) Act 1999 (NSW), would require (1) that the author's treatment was malicious, which is difficult to establish, as most of the impugned measures are permitted under domestic law; (2) that it was without reasonable and probable cause; and (3) that harm or injury be established. Any course of action requiring damage to be established would be futile, given that the psychiatrist was unable to determine the exact nature of any damage caused to the author as a result of his treatment.

5.4 While damages could be recovered in negligence only for a recognizable psychiatric injury (not for emotional distress), the author submits that his deprivation of human contact for considerable periods, his humiliation by removal of his clothes, exposure to the cold and to constant lightning, and the physical assaults against him resulted in anxiety, distress, recurring nightmares and panic attacks related to his time in the safe cell. In these circumstances, no medical evidence of distinct psychological or emotional injury arising from his treatment is required to establish a breach of articles 7 and 10 of the Covenant.

Additional observations by the State party

6.1 On 29 July 2005, in response to the Committee's request to provide detailed information on the deadlines for, and de facto accessibility of, the administrative and judicial remedies that the author had allegedly failed to exhaust, the State party made an additional submission on admissibility. It argues that the author could have availed himself of several administrative remedies during his period of segregation. Such remedies would have been easily accessible and could have provided effective and timely relief, in view of the inevitable delays in judicial proceedings. In addition, he could have brought a common law action in tort within three years from the date when the breaches of articles 7 and 10 of the Covenant had allegedly occurred.

6.2 The State party submits that all prisoners in New South Wales adult correctional facilities have access to Official Visitors, who are appointed by the Minister for Corrective Services to visit correctional centres at least once per month and to receive complaints from prisoners. The Governor of the correctional centre must notify all inmates of the date and time of such visits and inform them about the possibility to complain to Official Visitors. Under the Crimes (Administration of Sentences) (Correctional Centre Routine) Regulation 1995, the Official Visitor is required to clarify the details of a case and to submit an Official Visitor's record form to the Commissioner of Corrective Services. He is also required to bring the complaint to the attention of the Governor of the correctional facility. The Regulation does not specify a deadline for bringing complaints to Official Visitors.

6.3 Moreover, the author could have requested permission to speak with the Governor of the correctional centre or with the Minister or the Commissioner for Corrective Services. Such requests must be conveyed to the Governor without unreasonable delay; the Governor is required to give the inmate an opportunity to speak on the matter or, respectively, to convey the request to the person with whom the inmate wished to speak during that official's next visit to the correctional facility.

6.4 The State party adds that an inmate may also directly complain, in writing, about his treatment in the correctional centre to the Minister or the Commissioner for Corrective Services. The complaint must be placed in a sealed envelope addressed to the Minister or the Commissioner and must not be opened, or its contents read or inspected. Although the Minister could not intervene personally, all complaints received by him were referred to the appropriate body, e.g. the Commissioner, who had the power to overrule or reverse any previously made decision.

6.5 The author also had the possibility of complaining to the Inspector-General of Corrective Services, whose mandate terminated on 30 September 2003. The Inspector-General was appointed by the Governor of New South Wales and was independent from the Department of Corrective Services. He was given full access to offenders held in custody, as well as to the premises and records of the Department, with a view to investigating and resolving complaints about the Department's conduct. This function could be exercised on his own initiative, at the request of the Minister for Corrective Services or in response to a complaint. Although no deadline for filing a complaint was specified, the Inspector-General had discretion to decide not to investigate complaints relating to incidents which had occurred too long ago or for which satisfactory alternative means of redress existed. He could recommend disciplinary action or criminal proceedings against officers of the Department.

6.6 As regards the author's period of segregation, the State party submits that, under the Crimes (Administration of Sentences) Act 1999, any prisoner whose segregation exceeds fourteen days has the right to appeal to the Serious Offenders Review Council. Prisoners must be informed of their right to appeal and must sign a form stating that they have been so informed.

Upon review, the Council may confirm, amend or revoke a segregation order. Pending the final outcome of a case, it may also order the suspension of the segregation or the prisoner's removal to another correctional centre.

6.7 Lastly, regarding judicial remedies, the State party reiterates that Australian courts consider themselves competent to deal with prisoners' challenges to the lawfulness of their confinement, including actions brought against acts in breach of a duty of care causing harm or injury to prisoners. The relevant cause of action was based on the tort of negligence in common law, subject to the Civil Liability Act 2002 (NSW), which provided for exclusion of personal liability for certain persons under certain circumstances. In accordance with the Crown Proceedings Act 1988 (NSW), the respondent party in proceedings commenced in common law tort against a government agency, which was not a separate legal entity, was the State of New South Wales. However, the author had failed to bring a court action in common tort negligence.

Author's comments

7.1 On 14 September 2005, the author commented on the State party's additional observations, denying that any of the above administrative or judicial remedies would in practice have been available to him or that they would have provided him with an effective remedy at the relevant time. He had never been advised of possible complaint mechanisms upon being admitted to Parklea Correctional Facility. In addition, the treatment complained of was to a large extent compatible with the relevant Australian laws and regulations.

7.2 The author submits that he was never told whether or when an Official Visitor would visit Parklea during his time of incarceration. This had deprived him of an opportunity to complain to the Official Visitor who was, in any event, required not to "interfere with the management of discipline of the correctional centre, or give any instructions to correctional centre staff or inmates".[24]

7.3 The author contends that the Governor of Parklea Correctional Centre dismissed his repeated complaints about the conditions of his detention by replying: "You are not in a boy's home anymore. This is the way we run the place." Or: "Nothing will be done about it; this is how we run the place and how you will be treated." Given that the decision whether or not to act on a complaint was within the Governor's discretion,[25] such a complaint was not an effective remedy. This was reflected by the fact that the author's file revealed that the Governor had approved of his segregation and confinement on six occasions during the relevant period.

7.4 The author claims that he had not been informed about the possibility of making a complaint to the Minister or Commissioner for Corrective Services, whether through the Governor or whether directly in writing. The fact that the Governor was not required to refer a complaint to the Minister or Commissioner but could dispose of the matter personally,[26] the purely recommendatory powers of the Commissioner, as well as the author's difficulties to read and write and the absence of pens, pencils or paper in his dry cell, showed that such complaints were not an effective remedy.

7.5 Although a lawyer from the Sydney Regional Aboriginal Corporation Legal Service filed a complaint with the Minister for Juvenile Justice on the author's behalf, following his release from segregation, no remedial action was taken on that complaint.

7.6 The author further submits that he was never informed about the possibility of complaining to the Inspector-General. Since the Inspector-General had discretion not to pursue complaints for which alternative means of redress existed, he could have dismissed his application on the ground that the author had already complained about his treatment to the Governor.

7.7 Similarly, he had never been advised that he could appeal his segregation to the Serious Offenders Review Council, nor had he signed a form stating that he had been so informed. Such an appeal would not have been an effective remedy, given that he was not a serious offender at the time of his segregation and that the Council had no competence to deal with issues other than segregation, such as, for example, his physical and medical treatment.

7.8 The author argues that, although he was aware that the Governor had authorized his treatment, as evidenced by his Department of Corrective Services file, he took all reasonable steps within the capacity of a 16 year old Aboriginal child with an intellectual disability to seek a change of his treatment, i.e. by complaining to his Aboriginal Deaths in Custody officer and to the Governor of the correctional centre.

7.9 By reference to the expert advice dated 7 May 2002 , the author reiterates that any court action for breach of duty of care would have been futile.

Issues and proceedings before the Committee

Consideration of admissibility

8.1 Before considering any claim contained in a communication, the Human Rights Committee must, in accordance with rule 93 of its rules of procedure, decide whether or not the communication is admissible under the Optional Protocol to the Covenant.

8.2 The Committee considers that the author has failed to substantiate, for purposes of admissibility, that the prison officers' attempts to secure him in April and May 1999 involved excessive use of force in violation of articles 7 and 10 and that his continuous camera surveillance was incompatible with these provisions.

8.3 With regard to the author's claim that his transfer to Parklea Correctional Centre on 22 March 1999 violated his rights under article 10, paragraph 3, the Committee notes that the State party has not invoked its reservation, to the effect that the obligation to segregate in article 10, paragraphs 2 (b) and 3, "is accepted only to the extent that such segregation is considered by the responsible authorities to be beneficial to the juveniles or adults concerned". However, the Committee need not consider whether the State party's reservation to article 10, paragraph 2 (b) and 3 applies, since the author's claims under these provisions are inadmissible on other grounds:

(a) As regards his claim that his transfer to Parklea Correctional Centre on 22 March 1999 violated article 10, paragraph 2 (b), the Committee recalls that this provision protects the right of accused juvenile persons to be separated from adults and to be brought as speedily as possible for adjudication. However, the author had the status of a convicted rather than an accused juvenile person at the time of his transfer to Parklea, since he was convicted of burglary, assault and causing bodily harm on 5 March 1999. His claim under article 10, paragraph 2 (b), is therefore inadmissible *ratione materiae* under article 3 of the Optional Protocol;

(b) As regards the claim under article 10, paragraph 3, the Committee notes that the author was in fact segregated from other inmates upon arrival at Parklea, where he was placed in a safe cell. The author has therefore not substantiated, for purposes of admissibility, how his transfer to Parklea Correctional Centre breached his right to be segregated from adult prisoners, and this part of the communication is therefore inadmissible under article 2 of the Optional Protocol.

8.4 As regards the author's claims relating to the periods of his solitary confinement, the removal of his clothes and blanket, his continued exposure to artificial light, and the prescription of Largactil, the Committee considers that he has sufficiently substantiated these claims, for purposes of admissibility. In particular, it considers that he has rebutted the State party's denial that he was placed in solitary confinement in a dry cell for 48 and 72 hours on 1 and 7 April 1999, respectively, by reference to Parklea Prison's Inmate Discipline Action Forms dated 4 and 11 April 1999, which confirm these alleged periods of solitary confinement.

8.5 With regard to exhaustion of domestic remedies, the Committee notes the State party's argument that the author has not exhausted administrative, judicial or other remedies available to him. It also notes the author's challenge to the effectiveness of complaints to the prison authorities or to the Ombudsman, as well as his doubts about the availability and the prospect of success of a court action for negligence.

8.6 The Committee recalls that the requirement, in article 5, paragraph 2 (b), of the Optional Protocol, to exhaust "all available domestic remedies" not only refers to judicial but also to administrative remedies, unless the use of such remedies would be manifestly futile or cannot reasonably be expected from the complainant.

8.7 As regards the possibility of complaining to the Ombudsman, the Committee recalls that any finding of this body would only have hortatory rather than binding effect so far as the authorities are concerned. It concludes that such a complaint cannot be considered an effective remedy,[27] which the author was required to exhaust, for purposes of article 5, paragraph 2 (b), of the Optional Protocol.

8.8 As regards the possibility of filing a complaint with the Minister for Corrective Services or with the Serious Offenders Review Council, the Committee notes the author's uncontested claim that he had not been informed about these or any other administrative remedies and that he was barely able to read or write at the time of his segregation at Parklea.

8.9 The Committee also recalls that the author made several attempts to change the conditions of his incarceration by complaining to his Aboriginal Deaths in Custody officer and to the Governor of the correctional centre. It also notes the author's contentions as to the Governor's replies to his complaints and observes that the effect of these replies was to discourage the author from submitting further complaints to the prison authorities. Given the author's age, his intellectual disability and his particularly vulnerable position as an Aboriginal, the Committee concludes that he made reasonable efforts to avail himself of existing administrative remedies, to the extent that these remedies were known to him and insofar as they can be considered to have been effective.

8.10 The decisive question is therefore whether or not effective judicial remedies were available to, and have not been exhausted by, the author. In this regard, the Committee recalls the State party's contention that Australian courts will not interfere with administrative decisions of prison authorities, if such decisions are found to have been bona fide and if they constitute a reasonable use of power of management. It also recalls that the State party has argued, and the author has conceded, that most of the measures imposed on the author were consistent with the relevant domestic law. It is therefore hardly conceivable that the author could successfully have challenged the decisions of the Parklea authorities at court.

8.11 As regards the possibility of bringing a court action based on the tort of negligence in common law, the Committee acknowledges the State party's argument that lack of evidence on the author's part does not have a direct bearing on the question of whether or not effective judicial remedies were available to him. However, the lack of evidence for a recognizable psychiatric injury does have a bearing on the question of whether or not it would have been futile for the author to exhaust such remedies. In this regard, the Committee observes that to be contrary to articles 7 and 10 of the Covenant, treatment of a person deprived of liberty must not necessarily cause any recognizable psychiatric injury to that person, as seems to be the standard required for establishing a tort in negligence under Australian law. It considers that the author has sufficiently shown, and the State party has not refuted, that the emotional distress and anxiety allegedly suffered by the author would have constituted insufficient grounds for filing a court action based on a breach of duty of care.

8.12 Against this background, the Committee considers that, although in principle judicial remedies were available, in accordance with article 2, paragraph 3, of the Covenant, it would have been futile for the author, in the circumstances of his case, to commence court proceedings. It therefore concludes that he was not required, for purposes of article 5, paragraph 2 (b), of the Optional Protocol, to exhaust these remedies.

8.13 The Committee concludes that the communication is admissible insofar as the author's claims raise issues under articles 7 and 10 of the Covenant, and to the extent that they relate to the periods of his solitary confinement, the removal of his clothes and blanket, his continued exposure to artificial light, and the prescription of Largactil to him.

Consideration of the merits

9.1 The Committee takes note of the author's allegation that his placement in a safe cell, as well as his confinement to a dry cell on at least two occasions, was incompatible with his age, disability and status as an Aboriginal, for whom segregation, isolation and restriction of movement within prison have a particularly deleterious effect. It notes the State party's argument that these measures were necessary to protect the author from further self-harm, to protect other inmates, and to maintain the security of the correctional facility.

9.2 The Committee recalls that persons deprived of their liberty must not be subjected to any hardship or constraint other than that resulting from the deprivation of liberty; respect for the dignity of such persons must be guaranteed under the same conditions as for that of free persons.[28] Inhuman treatment must attain a minimum level of severity to come within the scope of article 10 of the Covenant. The assessment of this minimum depends on all the circumstances of the case, such as the nature and context of the treatment, its duration, its physical or mental effects and, in some instances, the sex, age, state of health or other status of the victim.

9.3 The State party has not advanced that the author received any medical or psychological treatment, apart from the prescription of anti-psychotic medication, despite his repeated instances of self-harm, including a suicide attempt on 15 December 1999. The very purpose of the use of a safe cell "to provide a safe, less stressful and more supervised environment where an inmate may be counselled, observed and assessed for appropriate placement or treatment" was negated by the author's negative psychological development. Moreover, it remains unclear whether the requirements not to use confinement to a safe cell as a sanction for breaches of correctional centre discipline or for segregation purposes, or to ensure that such confinement does not exceed 48 hours unless expressly authorized, were complied with in the author's case. The Committee further observes that the State party has not demonstrated that by allowing the author's association with other prisoners of his age, their security or that of the correctional facility would have been jeopardized. Such contact could have been supervised appropriately by prison staff.

9.4 Even assuming that the author's confinement to a safe or dry cell was intended to maintain prison order or to protect him from further self-harm, as well as other prisoners, the Committee considers that the measure incompatible with the requirements of article 10. The State party was required by article 10, paragraph 3, read together with article 24, paragraph 1, of the Covenant to accord the author treatment appropriate to his age and legal status. In the circumstances, the author's extended confinement to an isolated cell without any possibility of communication, combined with his exposure to artificial light for prolonged periods and the removal of his clothes and blanket, was not commensurate with his status as a juvenile person in a particularly vulnerable position because of his disability and his status as an Aboriginal. As a consequence, the hardship of the imprisonment was manifestly incompatible with his condition, as demonstrated by his inclination to inflict self-harm and his suicide attempt. The Committee therefore concludes that the author's treatment violated article 10, paragraphs 1 and 3, of the Covenant.

9.5 As regards the prescription of anti-psychotic medication ("Largactil") to the author, the Committee takes note of his claim that the medication was administered to him without his consent. However, it also takes note of the State party's uncontested argument that the prescription of Largactil was intended to control the author's self-destructive behaviour. It recalls that the treatment was prescribed by the general practitioner at Parklea Correctional Centre and that it was only continued after the author had been examined by a psychiatrist. In the absence of any elements which would indicate that the medication was administered for purposes contrary to article 7 of the Covenant, the Committee concludes that its prescription to the author does not constitute a violation of article 7.

10. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts before it disclose violations of articles 10 and 24, paragraph 1, of the Covenant.

11. In accordance with article 2, paragraph 3, of the Covenant, the author is entitled to an effective remedy, including adequate compensation. The State party is under an obligation to ensure that similar violations do not occur in the future.

12. Bearing in mind that, by becoming a party to the Optional Protocol, the State party has recognized the competence of the Committee to determine whether there has been a violation of the Covenant or not and that, pursuant to article 2 of the Covenant, that State party has undertaken an obligation to ensure to all individuals within its territory or subject to its jurisdiction the rights recognized in the Covenant and to provide an effective and enforceable remedy in case a violation has been established, the Committee wishes to receive from the State party, within 90 days, information about the measures taken to give effect to the Committee's Views. The State party is also requested to publish the Committee's Views.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the Committee's annual report to the General Assembly.]

Notes

[1] The Covenant and the Optional Protocol to the Covenant entered into force for the State party respectively on 13 November 1980 and 25 December 1991. Upon ratification of the Covenant, the State party entered the following reservation:

> "Article 10
>
> In relation to paragraph 2 (a), the principle of segregation is accepted as an objective to be achieved progressively. In relation to paragraphs 2 (b) and 3 (second sentence) the obligation to segregate is accepted only to the extent that such segregation is considered by the responsible authorities to be beneficial to the juveniles or adults concerned. […]."

[2] See Clinical Psychological Assessment, 19 October 2000, prepared by S.H., PhD, Associate professor and Head, Department of Behavioural Sciences in Medicine, University of Sydney, at p. 5.

[3] Section 28 (A) (2) of the New South Wales Children (Detention Centres) Act (1987) reads: "(2) In any criminal proceedings against a child to whom this section applies a court may remand the child to a prison pending the commencement of the hearing of the proceedings or during any adjournment of the hearing, but only if: (a) the person by whom the proceedings were commenced or the Director-General applies for such remand, and (b) the child is not released on bail under the Bail Act 1978, and (c) the court is of the opinion that the child is not a suitable person for detention in a detention centre."

[4] Paragraph 12.19.2 of the New South Wales Department of Corrective Services Operational Procedure Manual provides that "(a) [t]he use of a safe cell is a short term management strategy. The purpose is to provide a safe, less stressful and more supervised environment where an inmate may be counselled, observed and assessed for appropriate placement or treatment. (b) The safe cell is not a punishment area and is not to be used as a sanction for breaches of Correctional Centre discipline or for segregation purposes. [...] (d) No inmate is to be held in a safe cell for longer than 48 hours without the approval of the Regional Commander".

[5] The State party defines a "dry cell" as "a secure cell used for the short term containment of inmates, and is used only in the case where [inmates are] unable to provide a urine sample or are suspected of concealing contraband in their bodies".

[6] The author refers to communications No. 458/1991, *Mukong v. Cameroon*, Views adopted on 21 July 1994; No. 28/1978, *Weisz v. Uruguay*, Views adopted on 29 October 1980; No. 8/1975, *Weismann v. Uruguay*, Views adopted on 3 April 1980; No. 900/1999, *C. v. Australia*, Views adopted on 28 October 2002.

[7] Human Rights Committee [69], Concluding observations on the third and fourth periodic reports of Australia, 28 July 2000.

[8] In this regard, the author refers to communication No. 229/1987, *Reynolds v. Jamaica*, Views adopted on 8 April 1991; communication No. 253/1987, *Kelly v. Jamaica*, Views adopted on 8 April 1991; communication No. 240/1987, *Collins v. Jamaica*, Views adopted on 1 November 1991.

[9] See communication No. 619/1995, *Fray Deidrick v. Jamaica*, Views adopted on 9 April 1998, at para. 6.1, and No. 680/1996, *Gallimore v. Jamaica*, Views adopted on 23 July 1999, at para. 6.5.

[10] The author refers to *Vezitis v. McGeechan* (1974) 1 NSWLR 718.

[11] The State party quotes from communication No. 75/1980, *Fanali v. Italy*.

[12] Reference is made to communications No. 363/1989, *RLM v. France*, Decision on admissibility adopted on 6 April 1992; No. 348/1989, *GB v. France*, Decision on admissibility adopted on 1 November 1991; and No. 347/1988, *SG v. France*, Decision on admissibility adopted on 1 November 1991.

[13] See Crimes (Administration of Sentences) Act 1999 (NSW), section 19 (1).

[14] See ibid., section 20 (1).

[15] *Christopher Murielle et al. v. David Moore and Eric Holt* [2000], NZSC 23.

[16] See Crimes (Administration of Sentences) Act 1999 (NSW), section 263 (1) and (2).

[17] The State party refers to, inter alia, communications No. 224/1987, *A and SN v. Norway*, Decision on admissibility adopted on 11 July 1988, at para. 6.2, and No. 397/1990, *PS v. Denmark*, Decision on admissibility adopted on 22 July 1992.

[18] The State party refers to communication No. 265/1987, *Voulanne v. Finland*, Views adopted on 7 April 1989.

[19] By reference to communication No. 353/1988, *Grant v. Jamaica*, Views adopted on 31 March 1994 (at para. 8), the State party argues that the author's claims are not supported by the psychological reports submitted by him.

[20] See section 10 of the then applicable Crimes (Administration of Sentences) Act (1999): The Commissioner may direct that an inmate be held in segregated custody if of the opinion that the association of the inmate with other inmates constitutes or is likely to constitute a threat to: "(a) the personal safety of any other person, or (b) the security of a correctional centre, or (c) good order and discipline within a correctional centre".

[21] Regulation 171 of the then applicable Crimes (Correctional Centres Routine) Regulation (1995) states: "(1) An inmate must not: (a) be put in a dark cell, or under mechanical restraint, as a punishment, or (b) be subjected to: (i) solitary confinement, or (ii) corporal punishment, or (iii) torture, or (iv) cruel, inhuman or degrading treatment, or (c) be subjected to any other punishment or treatment that may reasonably be expected to adversely affect the inmate's physical or mental health. […] (2) For the purposes of sub-clause (1) (b) (i): (a) segregating an inmate from other inmates under section 10 of the Act, and (b) confining an inmate to cell in accordance with an order under section 53 of the Act, and (c) keeping an inmate separate from other inmates under this Regulation, and (d) keeping an inmate alone in a cell, where the medical officer considers that it is desirable in the interest of the inmate's health to do so, are not solitary confinement."

[22] Section 14.1.6 (on "Segregation of Aboriginal Inmates") of the then applicable Manual reads: "It is undesirable that an Aboriginal inmate should be placed in segregation. Segregation should only occur where there is no other means of managing the inmate in the circumstances. However, where segregation action is necessary, the Governor shall: (i) ensure that the inmate is provided with daily exercise, appropriate clothing, food water, and access to visits; (ii) ensure that the segregation cell has adequate lighting, sanitation facilities and heating; (iii) ensure that the relevant Regional Aboriginal Officer is informed; (iv) provide the segregated inmate with access to a member of the Aboriginal Inmate Committee or appropriate Aboriginal delegate. This access may assist inmates who are experiencing problems, which could lead to physical or mental harm. This procedure accords with Recommendations 181 and 183 of the Royal Commission into Aboriginal Deaths in Custody."

[23] The author claims that the ineffectiveness of administrative remedies was acknowledged by the Committee in communication No. 900/1999, *C. v. Australia*.

[24] Regulation 133 (3) of the Crimes (Administration of Sentences) (Correctional Centre Routine) Regulations 1995 (NSW).

[25] Ibid., Regulation 135 (3).

[26] Ibid., Regulation 136 (3).

[27] See communication No. 900/1999, *C. v. Australia*, Views adopted on 28 October 2002, at para. 7.3.

[28] General comment No. 21, 1992 [44], Article 10, at para. 3.

KK. Communication No. 1196/2003, *Boucherf v. Algeria*
(Views adopted on 30 March 2006, eighty-sixth session)*

Submitted by: Fatma Zohra Boucherf (represented by counsel)

Alleged victims: Riad Boucherf and the author

State party: Algeria

Date of communication: 30 June 2003 (initial submission)

Subject matter: Disappearances, incommunicado detention, trial in absentia

Procedural issues: None

Substantive issues: Right to liberty and security of person; arbitrary arrest and detention; right to counsel; prohibition of torture, and cruel, inhuman or degrading treatment or punishment; trial in absentia; right to recognition before the law

Articles of the Covenant: 2, paragraph 3; 7; 9; 14; 16

Articles of the Optional Protocol: 2 and 5

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 30 March 2006,

Having concluded its consideration of communication No. 1196/2003, submitted to the Human Rights Committee on behalf of Fatma Zohra Boucherf and Riad Boucherf under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the author of the communication, and the State party,

Adopts the following,

Views under article 5, paragraph 4, of the Optional Protocol

1.1 The author of the communication, dated 30 June 2003, is Mrs. Fatma Zohra Boucherf, an Algerian national residing in Algeria. She submits the communication on behalf of her son,

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* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Nisuke Ando, Ms. Christine Chanet, Mr. Maurice Glèlè Ahanhanzo, Mr. Edwin Johnson, Mr. Walter Kälin, Mr. Ahmed Tawfik Khalil, Mr. Rajsoomer Lallah, Mr. Michael O'Flaherty, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Ivan Shearer, Mr. Hipólito Solari-Yrigoyen and Mr. Roman Wieruszewski.

Mr. Riad Boucherf, an Algerian national born on 12 January 1974 in Kouba (Algeria), who has been missing since 25 July 1995. The author claims that her son is a victim of violations by Algeria of articles 2, paragraph 3, 7, 9, 14 and 16 of the International Covenant on Civil and Political Rights (the "Covenant") and that she is herself a victim of a violation by Algeria of article 7 of the Covenant. The author is represented by counsel. The Covenant and the Optional Protocol to the Covenant entered into force for the State party on 12 December 1989.

1.2 On 11 July and 23 August 2005, counsel requested interim measures, relating to the State party's draft amnesty law (*Projet de Charte pour la Paix et la Reconciliation Nationale*), which was submitted to a referendum on 29 September 2005. For counsel, the draft law was likely to cause irreparable harm to the victims of disappearances, putting at risk those persons who are still disappeared, and deprive victims of an effective remedy as well as render the views of the Human Rights Committee ineffective. Counsel therefore requested that the Committee invite the State party to suspend its referendum until the Committee issued views in three cases, including the present case. The request for interim measures was transmitted to the State party on 27 July 2005 for comments. No comments were received. On 23 September 2005, the Special Rapporteur on new communications and interim measures requested the State party not to invoke against individuals who have submitted or may submit, communications to the Committee, the provisions of the law affirming "that no-one, in Algeria or abroad, has the right to use, or make use of, the wounds caused by the national tragedy in order to undermine the institutions of the People's Democratic Republic of Algeria, render the State fragile, question the integrity of all the agents who served it with dignity, or tarnish the image of Algeria abroad", and rejecting "all allegations aiming at rendering the State responsible for deliberate disappearances. They [the Algerian people] consider that reprehensible acts on the part of State agents, which have been punished by law each time they have been proved, cannot be used as a pretext to discredit the whole of the security forces who were doing their duty for their country and received public backing".

The facts as presented by the author

2.1 Mr. Boucherf was arrested, together with Bourdib Farid and Benani Kamel, on 25 July 1995 at 11 a.m. in his neighbourhood by five plainclothes policemen from the 17th arrondissement of Algiers. They were handcuffed, put into the trunk of the cars (the author mentions a white car and a Daewoo) and driven away to the 17th arrondissement police station. The author was alerted by neighbours who had witnessed the arrest. She began making enquiries about the whereabouts of her son the next day. She claims that the arrest is linked to the death of a policeman, Yadel Halim, on 13 July 1995. The fiancé of Yadel Halim's sister (nicknamed "Sâad") was allegedly one of the plainclothes policemen who conducted the arrest on 25 July 1995.

2.2 On 30 July 1995 the same white car returned and the author's other son, Amine Boucherf, was arrested by a policeman nicknamed "Rambo". The author claims that Amine, Bourdib Farid and Benani Kamel were released on 5 August 1995 from the central police station. Amine Boucherf reported that on 30 July 1995, while in detention at the 17th arrondissement police station, he spoke to another detainee, Tabelout [Tablot] Mohamed, who confirmed that Riad Boucherf was being held there. In December 1996, the author was asked by the police of Aïn-Wâadja to find Tabelout Mohamed so that they could take his testimony. She accompanied him to the police station on 21 December 1996, where he stated that he had been tortured with Riad Boucherf and that they had been taken to the Garidi cemetery by a policeman of the 17th arrondissement and told that they would be buried there. Tabelout Mohamed testified that he would be able to identify the torturers.

2.3 The author submits a written testimony by Bourdib Farid corroborating her version of events. As to the arrest, Bourdib Farid identifies a police officer called "Boukraa" and a driver called Kamel (known as "Tiger"), both of whom are from Birkhadem. He also confirms that he and Riad Boucherf were held together for two days in the central police station before being separated. He testifies to having been tortured with Riad Boucherf by drunk and hooded policemen. On 27 July 1995, they were taken to the police station of Bourouba with their hands tied behind their backs with wire. There, they were tied to a tree in the courtyard, and left there until the next day. They were subsequently returned to the central police station, separated, and tortured using a hand drill (*chignole*) on their chest. On the sixth day, Bourdib Farid contends that Riad Boucherf and four others were driven, hands tied, to a forest near Ben Aknoun zoological park. There, they were forced to kneel, heads facing downwards, while policemen pointed guns at their heads. Riad told the policemen that he was innocent and didn't know what they wanted. Bourdib Farid contends that Riad and himself were then driven back to the central police station and separated. He does not know what happened to the other four men. Bourdib Farid claims that this happened two days before he was released, and that the policemen tried to make him believe that Riad had managed to escape out of the trunk of the car. Bourdib Farid contends that this is untrue as he saw Riad return to the central police station with him.

2.4 In October 1995, the author was informed by mothers of other detainees that her son had been transferred from the central police station to Serkadji prison (Algiers). She went to the prison the next day and was informed that her son was being held in cell 15. Another policeman, after enquiring about the age of her son, stated that the occupant of cell 15 was not her son since he was an old man. She returned to the prison after a relative of a detainee confirmed in November 1995 that Riad Boucherf was held in Serkadji prison. The author went to the prison with that detainee's mother, who, after visiting her own son in Serkadji, stated that the prisoner held there named Riad was not in fact Riad Boucherf.

2.5 In January 1996, the parent of a neighbour, a nurse in the Châteauneuf centre, informed the author that her son was being held there, as he had been transferred to Mustapha Bacha hospital for 21 days with four broken ribs. Another eye witness reported having seen Riad Boucherf in a detention centre in Boughar, where he was held for three days. Finally, in May 1996, three other men from the neighbourhood were arrested, detained in the 17th arrondissement police station, and sentenced to three years' imprisonment. On leaving prison, they told the author that they had been tortured by the same policemen who had tortured her son, as one of them had threatened to kill them "just like Riad …".

2.6 The author further claims that three men were tried at the Tribunal of Abane Ramdane Street (Algiers) and acquitted on 31 December 1996. Their absent co-defendants, including Riad Boucherf, were sentenced in absentia and in camera to life imprisonment. Although a legal representative, one Maître Tahri, was at the trial, the author never obtained a copy of the judgement.

2.7 The author contends that she has endured numerous house visits (including on 11 August 1995, 6 June, 16 November and 25 November 1996) and intimidation by the security forces, questioning her on the whereabouts of her son. The author recalls that on 6 June 1995 policemen from Aïn-Wâadja obtained the names of the other men arrested with her son, and a week later took their testimony.

2.8 As of 1995 and every two to three months thereafter, the author has written to the Director of Public Prosecutions of the Tribunal of Hussein Dey and of the Court of Algiers (*Procureur Général du Tribunal d'Hussein Dey et de la Cour d'Alger*), the President of the Republic, the Head of Government, the Ombudsman of the Republic (*Médiateur de la République*), the President of the National Observatory for Human Rights (*Observatoire National des Droits de l'Homme*) and the ministries of defence, justice and the interior, requesting an investigation into the whereabouts of her son. She submitted a total of 14 complaints between 13 November 1995 and 17 February 1998.

2.9 In this regard, she has been summoned by various bodies (including the Ministry of Defence; the police services of Aïn-Wâadja, the 17th arrondissement of Algiers, Kouba and Hussein Dey; the investigating magistrate of the Tribunal of Hussein Dey; and the Director of Public Prosecutions of the Court of Algiers) for enquiries. During these meetings, she was repeatedly told that the authorities had no information on the whereabouts of her son, and that he was in fact sought by the police. This version was confirmed to her in writing by the Director of Public Prosecutions of the Tribunal of Hussein Dey on 13 July, 12 October and 23 October 1996, 29 March, 25 September and 15 October 1997, as well as by the Director of Public Prosecutions of the Court of Algiers on 4 March 1997.

2.10 On 23 February 1997, the author received a letter from the Ombudsman, acknowledging receipt of her complaint and stating the matter was being investigated. On 9 September 1997, the police issued a statement denying that her son had ever been arrested or was in their custody. By letter of 6 September 1999, the President of the National Observatory for Human Rights informed the author that her son was not sought, nor had he been arrested. He also noted that the matter had been investigated by the police under case file No. 1990 of 6 September 1998.

2.11 Finally, the author was summoned by the investigating magistrate of the Tribunal of Hussein Dey on 30 April 2000 and in February 2002 (when she was told her son was a "terrorist"), and informed on 29 April 2003 of its decision of 26 April 2003 that there were no grounds for prosecution (*non-lieu*). On 6 May 2003 the Director of Public Prosecutions of the Court of Algiers informed the author that the decision not to prosecute had been referred to the Indictment Division (*Chambre d'Accusation*) of the Court of Algiers for review.

2.12 The author also submits reports by the Collectif des Familles de Disparu(e)s en Algérie and Human Rights Watch highlighting the widespread concerns about disappearances in Algeria, the intimidation suffered by family members, and the lack of adequate response and investigation on the part of the authorities.

2.13 The author claims to have exhausted all domestic remedies: remedies before judicial authorities and before independent administrative bodies responsible for human rights (the Ombudsman and the National Observatory for Human Rights), as well as the highest State authorities. She argues that any non-exhaustion lies in the authorities' refusal to accede to her request to investigate the arrest, detention and disappearance of her son, and their simple denial that he was ever arrested. She claims that all the domestic remedies which she initiated proved ineffective and futile. Although she could have challenged the investigating magistrate's decision of 26 April 2003 that there were no grounds for prosecution (*non-lieu*), under Algerian law she needed to do this within three days. As she only received notice of the decision on 29 April 2003, she was precluded from challenging the decision.

2.14 The author notes that the case was submitted to the Working Group on Enforced or Involuntary Disappearances, but that the Committee has stated that this Working Group does not "constitute a procedure of international investigation or settlement within the meaning of article 5, paragraph 2 (a), of the Optional Protocol".[1]

The complaint

3.1 The author claims that Riad Boucherf is a victim of a violation of articles 2, paragraph 3, 7, 9, 14 and 16 of the Covenant, in view of his alleged arbitrary arrest, detention and disappearance, and credible reports that he was tortured or subjected to cruel, inhuman or degrading treatment; and because the Algerian authorities did not conduct a thorough and in-depth investigation or instigate any proceedings, despite the author's numerous requests. The author's son was judged in camera and in absentia, without the assistance of a lawyer, and he had no access to an effective remedy. The author also claims that Riad Boucherf was denied recognition before the law by being held incommunicado and therefore removed from the protection of the law.[2]

3.2 The author also claims that she is a victim of a violation of article 7 of the Covenant because of the failure of the authorities to inform her as to the fate and whereabouts of her son, and because of the continued intimidation which she has suffered at the hands of the authorities.

The State party's submission on the admissibility and merits of the communication and author's comments

4.1 By note verbale of 26 January 2004, the State party contests the admissibility of the communication for non-exhaustion of domestic remedies. It clarifies that pursuant to one of the author's complaints the Director of Public Prosecutions of the Tribunal of Hussein Dey opened a preliminary investigation and seized the investigating magistrate of the First Chamber of the Tribunal. After hearing several witnesses, the investigating magistrate decided on 26 April 2003 that there were no grounds to initiate a prosecution. As the Director of Public Prosecutions disagreed with the decision, he appealed it on 27 April 2003. The matter was therefore sent back to the Indictment Division of the Court of Algiers, which annulled the contested decision on 13 May 2003 and ordered further investigations and hearing of the witnesses. As this procedure is still pending, the author has not exhausted domestic remedies. The State party concludes that the fact the contested decision was annulled proves that the remedy is effective.

4.2 Further, the State party clarifies that the author could have appealed the decision of the investigating magistrate herself, as article 173 of the Code of Criminal Procedure states that the appeal must be lodged within three days of the notification of the judgement. Further, article 726 of the same Code explains that the three-day time frame does not include the first day (*jour initial*) or the last day (*échéance*). As such, the author could have brought an appeal as late as 3 May 2003.

4.3 Subsidiarily, the State party denies that the author's son was arrested on 25 July 1995, that he was sentenced on 31 December 1995 or that he was detained at Serkadji prison.

5.1 By letter of 23 March 2004, counsel highlights the State party's challenge to her version of the facts, despite numerous corroborating testimonies, and that in such circumstances the Committee may consider such allegations as substantiated. Counsel also contends that the remedies highlighted by the State party are ineffective, given that the author's complaints all resulted in the same "official version" of the facts, namely a denial of the arrest and disappearance of her son.

5.2 As to the appeal of the decision not to initiate a prosecution (*non-lieu*) of 26 April 2003, the author was not aware of how to calculate the time limits, and had been told by a civil servant at the Tribunal that she had to appeal "within three days". According to article 168, paragraph 1, of the Code of Criminal Procedure, the author should have received a recorded delivery notice of the decision within 24 hours, instead of the two days it took in this instance. Regarding the decision of the Indictment Division, counsel highlights that the author was not able to attend the hearing as she received notice of it on the day it took place (13 May 2003), nor did she receive notice of its decision of 13 May 2003.

5.3 In any event, in view of the protracted investigations and complete denial by the authorities, the author need not continue to wait for a decision which, in all likelihood, will simply find that her son joined an "underground terrorist group". Counsel highlights that the authorities continue to criminalize victims, as Bourdib Farid was once again summoned to give the same testimony, and the author's home was searched again on 28 November 2003. Finally, counsel refers to the Committee's jurisprudence that for a remedy to be effective, it should be judicial in nature, and lead to an effective investigation, judgement and punishment of those responsible, and reparation.[3] Counsel also refers to the excessive length of procedures in Algeria, in this case nine years since the disappearance of the author's son, without any proper investigation, identification of those responsible, judgement or reparation.[4]

Further State party observations and author's comments

6. In a letter dated 18 June 2004 the State party reiterates its denial that Riad Boucherf was ever held at Serkadji or El Harrach prisons, or indeed at any detention centre on its territory. It also contends that the communication shows numerous inconsistencies, which lead it to believe that the author was unfortunately misled in her legitimate search for the truth. In particular, the State party highlights that although the author claims that a lawyer attended her son's trial in 1996, she did not specify any further details as to his identity.

7. By letter of 15 November 2004 counsel highlights that although the State party contends there are numerous inconsistencies, it does not specify any, beyond the point about the lawyer attending the trial. Counsel clarifies that no lawyer attended Riad Boucherf's trial. Maître Mohammed Tahri saw Riad Boucherf's name on a list of persons awaiting sentence and attempted to attend the hearing, but was prevented from doing so. Finally, counsel notes that the author was notified on 19 September 2004 that the Tribunal of Hussein Dey handed down a judgement on 8 September 2004 in the outstanding appeal, ruling that there were no grounds for prosecution (*non-lieu*). Therefore, all domestic remedies have been exhausted.

Issues and proceedings before the Committee

Admissibility considerations

8.1 Before considering any claim contained in a communication, the Human Rights Committee must, in accordance with rule 93 of its rules of procedure, decide whether or not the communication is admissible under the Optional Protocol to the Covenant.

8.2 The Committee notes that the same matter is not being examined under any other international procedure, in line with the requirements of article 5, paragraph 2 (a), of the Optional Protocol. The Committee also notes that the State party maintains that the author has not exhausted available domestic remedies. On this point, the Committee takes note of the author's claim that the Tribunal of Hussein Dey handed down a judgement on 8 September 2004, confirming that there were no grounds for initiating prosecution (*non-lieu*). The Committee notes that the State party has not responded to this point. The Committee also considers that the application of domestic remedies has been unduly prolonged in relation to the author's other complaints introduced since 1995. Therefore, the Committee considers that the author met the requirements of article 5, paragraph 2 (b), of the Optional Protocol.

8.3 As to the alleged violation of article 14, the Committee considers that the author's allegations have been insufficiently substantiated for purposes of admissibility. On the question of the complaints under articles 2, paragraph 3, 7, 9 and 16, the Committee considers that these allegations have been sufficiently substantiated. The Committee therefore concludes that the communication is admissible under articles 2, paragraph 3, 7, 9 and 16 of the Covenant and proceeds to their consideration on the merits.

Consideration of the merits

9.1 The Human Rights Committee has considered the present communication in the light of all the information made available to it by the parties, as provided for in article 5, paragraph 1, of the Optional Protocol.

9.2 The Committee recalls the definition of enforced disappearance in article 7, paragraph 2 (i), of the Rome Statute of the International Criminal Court: "Enforced disappearance of persons means the arrest, detention or abduction of persons by, or with the authorization, support or acquiescence of, a State or a political organization, followed by a refusal to acknowledge that deprivation of freedom or to give information on the fate or whereabouts of those persons, with the intention of removing them from the protection of the law for a prolonged period of time." Any act of such disappearance constitutes a violation of many of the rights enshrined in the Covenant, including the right to liberty and security of the person (art. 9), the right not to be subjected to torture or to cruel, inhuman or degrading treatment or punishment (art. 7), and the right of all persons deprived of their liberty to be treated with humanity and with respect for the inherent dignity of the human person (art. 10). It also violates or constitutes a grave threat to the right to life (art. 6).[5] In the present case, the author invoked articles 7 and 9.

9.3 With regard to the author's claim regarding the disappearance of her son, the Committee notes that the author and the State party have submitted different versions of the events in question. While the author contends that her son was arrested on 25 July 1995 and sentenced in absentia on 31 December 1996 by the Tribunal of Abane Ramdane Street (Algiers), the State party categorically denies that Riad Boucherf was ever arrested, detained or sentenced. The Committee also recalls that according to the National Observatory for Human Rights, the author's son was never sought or arrested by the security services. The Committee notes that the State party has not responded to the sufficiently detailed allegations exposed by the author.

9.4 The Committee has consistently maintained[6] that the burden of proof cannot rest on the author of the communication alone, especially considering that the author and the State party do not always have equal access to the evidence and that frequently the State party alone has access to the relevant information. It is implicit in article 4, paragraph 2, of the Optional Protocol that the State party has the duty to investigate in good faith all allegations of violations of the Covenant made against it and its representatives and to furnish to the Committee the information available to it. In cases where the allegations are corroborated by credible evidence submitted by the author and where further clarification of the cases depends on information exclusively in the hands of the State party, the Committee may consider the author's allegations as adequately substantiated, in the absence of satisfactory evidence and explanation to the contrary submitted by the State party. In the present case, the Committee has been provided with statements of eyewitnesses who were detained together with Riad Boucherf and who were later released, concerning his detention and treatment in prison and later "disappearance".

9.5 As to the alleged violation of article 9, the information before the Committee reveals that Riad Boucherf was removed from his home by State agents. The State party has not addressed the author's claims that her son's arrest and detention was arbitrary or illegal, or that he has been unaccounted for since 25 July 1995, other than submitting a general denial to the Committee. Under these circumstances, due regard must be given to the detailed information provided by the author. The Committee recalls that incommunicado detention as such may violate article 9,[7] and again notes the author's claim that her son has been held incommunicado since 25 July 1995, without any possibility of access to a lawyer, or of challenging the lawfulness of his detention. In the absence of any pertinent clarification on this point from the State party, the Committee concludes that article 9 has been violated.

9.6 As to the alleged violation of article 7 of the Covenant, the Committee recognizes the degree of suffering involved in being held indefinitely without contact with the outside world. In this context, the Committee recalls its general comment No. 20, on article 7, which recommends that States parties should make provision against incommunicado detention. In the circumstances, the Committee concludes that the disappearance of the author's son and the prevention of contact with his family and with the outside world constitute a violation of article 7 of the Covenant.[8] Further, the circumstances surrounding Riad Boucherf's disappearance and the several concordant testimonies that he was repeatedly tortured give rise to a strong inference that he was so treated. Nothing has been submitted to the Committee by the State party to dispel or counter such an inference. The Committee concludes that the treatment of Riad Boucherf amounts to a violation of article 7.[9]

9.7 The Committee also notes the anguish and stress caused to the author by the disappearance of her son and the continued uncertainty concerning his fate and whereabouts. The Committee is therefore of the opinion that the facts before it reveal a violation of article 7 of the Covenant with regard to the author herself.[10]

9.8 In light of the above findings, the Committee does not consider it necessary to deal with the complaint in respect of article 16 of the Covenant.

9.9 The author has invoked article 2, paragraph 3, of the Covenant, which requires States parties to ensure that individuals have accessible, effective and enforceable remedies to vindicate the rights enshrined in the Covenant. The Committee attaches importance to States parties' establishing appropriate judicial and administrative mechanisms for addressing claims of rights violations under domestic law. It refers to its general comment No. 31 on the nature of the general legal obligation imposed on States parties to the Covenant, which provides inter alia that a failure by a State party to investigate allegations of violations could in and of itself give rise to a separate breach of the Covenant.[11] In the present case, the information before the Committee indicates that the author did not have access to such effective remedies, and concludes that the facts before it disclose a violation of article 2, paragraph 3, of the Covenant in conjunction with articles 7 and 9.

10. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts before it reveal violations by the State party of articles 7 and 9 of the Covenant in relation to the author's son, and article 7 in relation to the author, in conjunction with a violation of article 2, paragraph 3, of the Covenant.

11. In accordance with article 2, paragraph 3, of the Covenant, the State party is under an obligation to provide the author with an effective remedy, including a thorough and effective investigation into the disappearance and fate of the author's son, his immediate release if he is still alive, adequate information resulting from its investigation, and adequate compensation for the author and her family for the violations suffered by the author's son. The State party is also under a duty to prosecute criminally, try and punish those held responsible for such violations. The State party is also under an obligation to take measures to prevent similar violations in the future. The Committee associates itself with the request made by the Special Rapporteur on new communications and interim measures dated 23 September 2005 (see paragraph 1.2) and reiterates that the State party should not invoke the provisions of the draft amnesty law (*Projet de Charte pour la Paix et la Réconciliation Nationale*) against individuals who invoke the provisions of the Covenant or have submitted or may submit communications to the Committee.

12. Bearing in mind that, by becoming a party to the Optional Protocol, the State party has recognized the competence of the Committee to determine whether there has been a violation of the Covenant or not and that, pursuant to article 2 of the Covenant, that State party has undertaken to ensure all individuals within its territory or subject to its jurisdiction the rights recognized in the Covenant and to provide an effective and enforceable remedy in case a violation has been established, the Committee wishes to receive from the State party, within 90 days, information about the measures taken to give effect to the Committee's Views. The State party is also requested to publish the Committee's Views.

[Adopted in English, French and Spanish, the French text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the Committee's annual report to the General Assembly.]

Notes

[1] Communication No. 540/1993, *Celis Laureano v. Peru*, Views adopted on 25 March 1996, para. 7.1.

[2] Counsel refers to the concluding observations of the Human Rights Committee on the second periodic report of Algeria (CCPR/C/79/Add.95, 18 August 1998, para. 10).

[3] Referring to communication No. 612/1995, *José Vicenté et al. v. Colombia*, Views adopted on 19 August 1997, para. 5.2; communication No. 563/1993, *Bautista de Arellana v. Colombia*, Views adopted on 27 October 1995, para. 8.2; communication No. 4/1977, *William Torres Ramirez v. Uruguay*, Views adopted on 23 July 1980, para. 5. Counsel also refers to general comment No. 26.

[4] Counsel refers to communication No. 563/1993, *Bautista de Arellana v. Colombia*, Views adopted on 27 October 1995, where the Committee found that a seven-year delay exceeded reasonable delays for the purposes of article 5, paragraph 2 (b), of the Optional Protocol; communication No. 612/1995, *José Vicenté et al. v. Colombia*, Views adopted on 19 August 1997 (5 years of procedure); and communication No. 859/1999, *Jiménez Vaca v. Colombia*, Views adopted on 25 March 2002, para. 6.4 (9 years of procedure).

[5] See communication No. 950/2000, *Sarma v. Sri Lanka*, Views adopted on 31 July 2003, para. 9.3.

[6] Communication No. 146/1983, *Baboeram-Adhin and others v. Suriname*, Views adopted on 4 April 1985, para. 14.2; communication No. 139/1983, *Conteris v. Uruguay*, Views adopted on 17 July 1985, para. 7.2; communication No. 202/1986, *Graciela Ato del Avellanal v. Peru*, Views adopted on 31 October 1988, para. 9.2; communication No. 30/1978, *Bleier v. Uruguay*, Views adopted on 29 March 1982, para. 13.3; communication No. 107/1981, *Elena Quinteros Almeida v. Uruguay*, Views adopted on 21 July 1983, para. 11.

[7] Communication No. 1128/2002, *Rafael Marques de Morais v. Angola*, Views adopted on 29 March 2005, para. 6.3. See also general comment No. 8, para. 2.

[8] Communication No. 540/1993, *Celis Laureano v. Peru*, Views adopted on 25 March 1996, para. 8.5; communication No. 458/1991, *Mukong v. Cameroon*, Views adopted on 24 July 1994, para. 9.4; communication No. 440/1990, *El-Megreisi v. Libyan Arab Jamahiriya*, Views adopted on 23 March 1994, para. 5.

[9] Communication No. 449/1991, *Mójica v. Dominican Republic*, Views adopted on 10 August 1994, para. 5.7.

[10] Communication No. 107/1981, *Quinteros v. Uruguay*, Views adopted on 21 July 1983, para. 14; communication No. 950/2000, *Sarma v. Sri Lanka*, Views adopted on 31 July 2003, para. 9.5.

[11] General comment No. 31, para. 15.

LL. Communication No. 1208/2003, *Kurbonov v. Tajikistan* (Views adopted on 16 March 2006, eighty-sixth session)*

Submitted by:	Bakhridin Kurbonov (not represented by counsel)
Alleged victim:	Dzhaloliddin Kurbonov, the author's son
State party:	Tajikistan
Date of communication:	17 June 2003 (initial submission)
Subject matter:	Torture, unfair trial
Substantive issues:	Level of substantiation of claim
Procedural issues:	Failure of State party to cooperate
Articles of the Covenant:	7, 9, 10, 14 (1) and (3) (e) and (g)
Articles of the Optional Protocol:	2

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 16 March 2006,

Having concluded its consideration of communication No. 1208/2003, submitted to the Human Rights Committee by Bakhridin Kurbonov under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the author of the communication, and the State party,

Adopts the following:

Views under article 5, paragraph 4, of the Optional Protocol

1. The author is Mr. Bakhridin Kurbonov, a Tajik national born in 1941, who submits the communication on behalf of his son, Dzhaloliddin Kurbonov, also a Tajik, born in 1975, at present imprisoned in Dushanbe. He claims that his son is a victim of violation by Tajikistan of

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* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Nisuke Ando, Mr. Prafullachandra Natwarlal Bhagwati, Ms. Christine Chanet, Mr. Maurice Glèlè Ahanhanzo, Mr. Edwin Johnson, Mr. Walter Kälin, Mr. Ahmed Tawfik Khalil, Mr. Rajsoomer Lallah, Mr. Michael O'Flaherty, Ms. Elisabeth Palm, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Ivan Shearer, Mr. Hipólito Solari-Yrigoyen and Mr. Roman Wieruszewski.

his rights under articles 7; 9, paragraphs 1 and 2; 10; and 14, paragraphs 1 and 3 (e) and (g), of the International Covenant on Civil and Political Rights. He is not represented by counsel.

Factual background

2.1 On 15 January 2001, the author's son was arrested and brought to the Operational Search Unit, Criminal Investigation Department, Ministry of Internal Affairs. The police officers allegedly intended to force him to confess guilt in the murder of two policemen. When they were unable to implicate him in the murder, they accused him of committing three robberies. He was detained until 6 February 2001, and allegedly spent 15 days handcuffed to the radiators in police offices. During this time he allegedly was systematically subjected to torture, in form of beatings and electric shocks. He was told that if he did not confess guilt, his relatives would experience "serious problems" and would be "tortured"; indeed, at one stage he learned that one of his brothers had been arrested, although he was subsequently released. The author's son did not confess, however, and was released on 6 February 2001.

2.2 The author complained about his son's mistreatment to the Prosecutor's Office and to the Ministry of Internal Affairs, following which an investigation was launched, and the policemen responsible were subjected to disciplinary measures and prosecuted. The author presents a copy of an order signed by the Deputy Minister of Internal Affairs on 10 May 2001, on the disciplining of five police officers in this regard (for "unfounded arrest and bringing to the Criminal Search Department", "unlawful detention", "unlawful search"). From this document, it transpires that the author's son was detained on 15 January and was obliged, "under pressure", to confess his participation in three robberies that took place in 1996-98. Criminal charges against him were filed only on 31 January 2001; the case was closed for lack of evidence on 28 February 2001. According to the order, no registry book existed for individuals brought to the premises of the Criminal Search Department and no record of the author's son's detention was produced, in violation of the requirements of the State party's Criminal Code.

2.3 However, the police officers who had previously tortured his son, thereafter, and together with other policemen, began to intimidate the author, his son and their family. On 15 August 2001, one of the author's nephews was beaten; on 31 August, the author's brother and father were beaten up by 12 policemen, some of whom were masked; on 16 September, the author and another of his sons were beaten by policemen during an unlawful search of their home. On 15 October 2001, the author's two sons were both severely beaten by policemen and sustained head injuries (a copy of a forensic medical examination of 18 October 2001 is provided; according to the conclusion of the expert, their injuries could have been the result of blows with a blunt object). Allegedly, these acts were designed to make the author withdraw his complaints against the police officers concerned. However, the author refused to do so.

2.4 On 28 November 2002, the author's son was again arrested in connection with the three robberies. He allegedly was again subjected to torture, and this time he was unable to withstand it, he confessed to the robberies as requested by the police. It was stressed that if he did not stand by his confession, the police would shoot him, on the pretext of preventing his escape. The author notes that his son was not provided with a lawyer until mid December 2002.

2.5 On 7 April 2003, the Criminal Chamber of the Supreme Court, acting as a first instance jurisdiction, found the author's son guilty of the robberies and sentenced him to nine years' imprisonment. The author submits that the trial was unfair and biased. Defence witnesses were not examined in court. The author's son retracted his confession obtained under torture during the preliminary investigation, but the court considered that this was a defence strategy and dismissed his claim of torture on the grounds that (a) the policeman said to be responsible denied in court that he had committed torture, and (b) because during the trial, the author's son "did not present (to the court) any unquestionable evidence that he was beaten by [these] police officers"; it also refused to take into account the fact that the police officers were disciplined for the unlawful and groundless detention of the author's son with use of illicit methods against him, declaring that the signature on the copy of the deputy Minister of Interior's Order was illegible. An appeal to the Supreme Court's Appellate Chamber was dismissed on 3 June 2003, without examining the claims of torture and the reversal of the burden of proof, in the first instance judgement of 7 April 2003.

The complaint

3.1 The author claims that his son was subjected to torture and forced to provide a confession, in violation of articles 7 and 14, paragraph 3 (g), of the Covenant.

3.2 According to him, his son's rights under article 9, paragraphs 1 and 2, were violated, because his son was detained unlawfully, and for a prolonged period he was not formally charged with any offence.

3.3 The author claims that, by being subjected to threats that his family would face "serious problems" and would be "tortured", his son suffered treatment incompatible with the State party's obligations under article 10 of the Covenant.

3.4 Finally, it is submitted that the trial court in Kurbonov's case was not impartial, in violation of article 14, paragraph 1, and its refusal to allow him to examine certain witnesses gave rise to a violation of article 14, paragraph 3 (e), of the Covenant.

State party's failure to cooperate

4. By notes verbales of 22 October 2003, 22 November 2005, and 12 December 2005, the State party was requested to submit to the Committee information on the admissibility and merits of the communication. The Committee notes that this information has not been received. The Committee regrets the State party's failure to provide any information with regard to admissibility or the substance of the author's claims. It recalls that under the Optional Protocol, the State party concerned is required to submit to the Committee written explanations or statements clarifying the matter and the remedy, if any, that it may have taken. In the absence of a reply from the State party, due weight must be given to the author's allegations, to the extent that these have been properly substantiated.

Issues and proceedings before the Committee

Consideration of admissibility

5.1 Before considering any claim contained in a communication, the Human Rights Committee must, in accordance with rule 93 of its rules of procedure, decide whether or not the communication is admissible under the Optional Protocol to the Covenant.

5.2 The Committee notes that the same matter is not being examined under any other international procedure, in line with the requirements of article 5, paragraph 2 (a), of the Optional Protocol.

5.3 In relation to the author's claim under article 14, paragraph 3 (e), of the Covenant, that his son was denied the right to have certain witnesses on his behalf examined in court, the Committee notes that the author has neither provided the identity of such potential witnesses, nor explained the relevance of their possible statements; furthermore, no explanation was given as to why the court considered they did not need to be examined. In the circumstances, the Committee considers that the author has failed sufficiently to substantiate this claim. for purposes of admissibility. Therefore, this part of the communication is inadmissible under article 2 of the Optional Protocol.

5.4 The Committee considers that the author's remaining claims under articles 7; 9, 10; and 14, paragraphs 1 and 3 (g), of the Covenant, to be sufficiently substantiated for purposes of admissibility, and proceeds to their consideration on the merits.

Consideration of the merits

6.1 The Human Rights Committee has considered the present communication in the light of all the information made available to it by the parties, as provided in article 5, paragraph 1, of the Optional Protocol.

6.2 The author has claimed that in January and November/December 2001, while in detention, his son was beaten and subjected to torture, by policemen, to force him to confess guilt in different crimes. Following the author's complaint about his son's unlawful detention, beatings and torture sustained in January 2001, the deputy Minister of Interior disciplined those responsible. In reprisal, the author and his family were pressured by police officers to revoke their claims in this regard, and were beaten and intimidated on several occasions; his son was also beaten during a wedding in October 2001, which was confirmed by a forensic medical certificate.

6.3 In court, the author's son retracted his confession because it had been obtained under torture. On 7 April 2003, the Criminal Chamber of the Supreme Court dismissed his claim on the ground that in court, the policemen suspected of having tortured him denied any wrongdoing, and because the author's son "did not present to the court any unquestionable evidence that he was beaten by [the] police officers". The court did not take into account that those policemen were cautioned afterwards for their unlawful acts (paragraph 2.2 above), holding that the signature on the copy of the order confirming their sanctions was illegible. On appeal, the court did not address these claims. The Committee notes that the above claims relate primarily to the evaluation of facts and evidence. It recalls its jurisprudence that it is generally for the courts of States parties to the Covenant to evaluate facts and evidence in a particular case, unless it can be ascertained that it was clearly arbitrary or amounted to a denial of justice.[1] In the present case, the facts presented by the author clearly demonstrate that the Supreme Court acted in a biased and arbitrary manner with respect to the complaints related to the author's son's torture during the preliminary detention, because of the summary and unreasoned rejection of the evidence, properly and clearly documented by the author, that he had been tortured. In their effect, the action of the courts placed the burden of proof on the author, whereas the general principle is that the burden of proof that the confession was made without duress is on the prosecution. The

Committee concludes that the treatment of Mr. Kurbonov during his preliminary detention, and the manner the courts addressed his subsequent claims to this effect, amounts to a violation of article 7 and of article 14, paragraph 1, of the Covenant. In light of this finding, the Committee considers unnecessary separately to examine the claim made under article 10.

6.4 In light of the above finding, the Committee concludes that the author's son's rights under article 14, paragraph 3 (g), have also been violated, as he was compelled to confess guilt to a crime.

6.5 The author has further claimed that his son was unlawfully arrested on 15 January 2001 and released on 6 February 2001, after 21 days of detention without having either his arrest or detention registered, nor having been promptly informed of the charges against him. An "official" criminal charge against him for robbery was only filed on 31 January 2001, and was subsequently dismissed on 28 February 2001 because of lack of evidence. The Committee also recalls that police officers were disciplined for having brought the author's son unlawfully to the Criminal Search Department of the Ministry of Interior, having groundlessly detained him there for 21 days without official record, and having opened a groundless criminal case against him. In the circumstances, the Committee considers that the facts before it disclose a violation of the author's son's rights under article 9, paragraphs 1 and 2, of the Covenant.

7. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the Covenant, is of the view that the facts before it disclose a violation of articles 7; 9, paragraphs 1 and 2; and 14, paragraphs 1 and 3 (g), of the Covenant.

8. In accordance with article 2, paragraph 3 (a), of the Covenant, the State party is under an obligation to provide Mr. Kurbonov with an effective remedy, which should include a retrial with the guarantees enshrined in the Covenant or immediate release, as well as adequate reparation. The State party is also under an obligation to prevent similar violations in the future.

9. Bearing in mind that, by becoming a party to the Optional Protocol, the State party has recognized the competence of the Committee to determine whether there has been a violation of the Covenant or not and that, pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory or subject to its jurisdiction the rights recognized in the Covenant and to provide an effective and enforceable remedy in case a violation has been established, the Committee wishes to receive from the State party, within 90 days, information about the measures taken to give effect to the Committee's Views. The State party is also requested to publish the Committee's Views.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the Committee's annual report to the General Assembly.]

Note

[1] See communication No. 541/1993, *Errol Simms v. Jamaica*, Inadmissibility decision adopted on 3 April 1995, para. 6.2.

MM. Communication No. 1211/2003, *Olivero v. Spain* (Views adopted on 11 July 2006, eighty-seventh session)*

Submitted by:	Mr. Luis Oliveró Capellades (represented by two counsels, Mr. José Luis Mazón Costa and Mr. Javier Ramos Chillón)
Alleged victim:	The author
State party:	Spain
Date of communication:	18 April 2002 (initial communication)
Subject matter:	Conviction in first instance by the highest court in the land with no possibility of appeal; conviction on a count not included in the indictment
Procedural issues:	Insufficiently substantiated claim, abuse of the right to submit communications
Substantive issues:	Right to have conviction and sentence referred to a higher court in accordance with the law; right to a fair trial
Articles of the Covenant:	14, paragraphs 1 and 5
Article of the Optional Protocol:	3

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 11 July 2006,

Having concluded its consideration of communication No. 1211/2003, submitted to the Human Rights Committee on behalf of Mr. Luis Oliveró Capellades under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the author of the communication and the State party,

Adopts the following:

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* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Nisuke Ando, Mr. Prafullachandra Natwarlal Bhagwati, Mr. Alfredo Castillero Hoyos, Ms. Christine Chanet, Mr. Edwin Johnson, Mr. Walter Kälin, Mr. Ahmed Tawfik Khalil, Mr. Rajsoomer Lallah, Ms. Elisabeth Palm, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Ivan Shearer, Mr. Hipólito Solari-Yrigoyen and Mr. Roman Wieruszewski.

Views under article 5, paragraph 4, of the Optional Protocol

1.1 The author of the communication, dated 18 April 2002, is Luis Oliveró Capellades, a Spaniard born in 1935. He claims to be the victim of a violation by Spain of article 14, paragraphs 1 and 5, of the Covenant. The Optional Protocol entered into force for the State party on 25 April 1985. The author is represented by Mr. José Luis Mazón Costa and Mr. Javier Ramos Chillón.

Factual background

2.1 Proceedings were brought against the author in June 1991 when, in response to press reports of irregularities in funding for the Spanish Socialist Workers' Party, charges were laid against a number of individuals. Since a member of the Senate and a member of the Congress of Deputies were involved, the investigation and trial of the case were assigned, in accordance with the Spanish Constitution, to the Supreme Court, the highest court in the land with jurisdiction over criminal cases. This affected the author, who maintains that he was thus deprived of the opportunity to appeal against his conviction. The author was the manager of Filesa, one of the trading companies implicated in the affair.

2.2 On 19 July 1997, the author states, the Supreme Court decided to omit from the indictment the charge of unlawful association, which was thus excluded from the trial. But, the author indicates, he was found guilty of this offence.

2.3 On 28 October 1997, the Supreme Court sentenced the author to six years in prison for forgery, two years for unlawful association and two years for an offence against the Public Treasury. The documents supplied by the author show that he lodged an application for *amparo* with the Constitutional Court on 20 November 1997, claiming breaches of several rights. It appears from the documents supplied that the Constitutional Court took three separate decisions, on different dates, on the author's application. On 22 December 1997 it ruled the author's claims which form the basis of his complaint to the Human Rights Committee inadmissible; on 25 January 1998 it ruled inadmissible all the author's other claims that his constitutional rights had been violated save the claim relating to the lawfulness of his conviction for forgery, which it decided to examine on the merits. It rejected this latter claim on 4 June 2001.

2.4 The author was amnestied under a general pardon decreed in December 2000, having served part of his sentence.

The complaint

3.1 The author claims a violation of article 14, paragraph 5, since he was tried and convicted in sole instance by the Supreme Court and had no opportunity to appeal against his conviction. He says that, unlike other States parties which entered reservations to article 14, paragraph 5, Spain entered no reservation about trial in first instance by the highest court in the land. He considers that acknowledging this right would have a minimal impact on the State party, for it would suffice to assign some Supreme Court justices to review the judgements handed down by the Court's Criminal Division. There is, he says, a procedure for appealing to a bench of Supreme Court justices against judgements handed down by the Administrative Litigation Division of the Court. He finds no justification whatsoever for there being no review of the judgement in the event of a conviction in first instance by the Supreme Court.

3.2 The author claims a violation of article 14, paragraph 1, since he was sentenced to two years in prison for unlawful association, a charge which had been expressly omitted from the indictment by the Supreme Court. Even if, as the Constitutional Court accepted, the omission was a mistake, the author says that the mistake was not of his making. He considers that this anomaly in the trial violates the right to a fair and impartial hearing and the principle of equality of arms.

Observations by the State party on admissibility and the merits, and comments by the author

4.1 In a note dated 7 January 2004, the State party points out that the author failed to furnish the Committee with the Supreme Court's judgement of 22 December 1997, which finally settled the issues which the author is raising with the Committee by rejecting an application from the author in which he made the same claims as he is now laying before the Committee. According to that judgement, the fact that a case is tried by the Supreme Court, the highest court in the land, substitutes for guaranteed access to an appellate court and excuses the lack of access to a higher-level court. The substitution stems from the need to preserve the independence of the judiciary when persons subject to privilege or immunity are put on trial; in any event, judgements of the Supreme Court can be appealed before the Constitutional Court, which then acts as an appellate court. As regards the alleged omission of the count of unlawful association on which the author was later convicted, the Constitutional Court pointed out that the author had not been left without a defence in the matter since the charge had been included in the original version of the indictment, in the decision to take the case to trial and in the final conclusions on the charges, and had been discussed.

4.2 The State party maintains that the author has abused the right to submit communications, and that the present communication is manifestly unfounded. The author lodged his complaint excessively late, in 2002, almost five years after the Supreme Court, in December 1997, settled the issues now before the Committee, and failed to supply important documents such as the said Supreme Court judgement. In the circumstances, and given that the author has benefited from a pardon, the State party holds that consideration of the communication on its merits by the Committee would amount to a clear "loss of legal certainty" and an "invitation" to reopen a criminal case which had been definitively closed, in which there had been nothing arbitrary, and in which all safeguards had been respected.

4.3 In a note dated 4 May 2004, the State party repeats its claims about admissibility and maintains, on the merits of the complaint relating to article 14, paragraph 5, that: (i) the case involving the author had been tried by the Supreme Court because that was required by article 123 of the Spanish Constitution, which gives the Supreme Court jurisdiction over trials of members of Parliament and the Senate; (ii) the assignment of jurisdiction to the Supreme Court was an extra safeguard for members of Parliament and the Senate from which the author had benefited because he had been charged jointly with two members of Parliament; (iii) the safeguard of being tried by the highest court in the land substituted for the safeguard of appeal proceedings and excused the lack of access to a higher-level court; (iv) the judgement of the Supreme Court could be reviewed by the Constitutional Court, which in such cases would act as an appellate court; (v) the jurisdiction of the Supreme Court was based on the need to preserve the independence of Spain's judicial institutions; and (vi) the trials of accused persons who did not enjoy parliamentary privilege or immunity could not be separated from the trials of those who did.

4.4 The State party goes on to say that: (i) in the case of petty criminal offences, review by a higher court is counterproductive since it makes the proceedings longer and more expensive; (ii) appeal is not limitless - there is a logical limit inasmuch as there cannot be an appeal of an appeal: if an individual acquitted in first instance is convicted on appeal, that conviction cannot be reviewed in turn; (iii) the reason for appeal is to avoid legal errors; but if a person is tried by the highest court in the land, there cannot be an appeal because there is no higher court to appeal to; (iv) trial in first instance by the highest court is justified and occasioned by the objective fact that an individual holds a public position which puts him or her in an unequal situation, and that person must, therefore, be treated unequally in order to secure equality before the law; (v) jurisdiction of this type exists in several States parties; (vi) the Covenant should be interpreted in a manner consistent with regional human rights agreements, and trial by the highest court should not be found to be in breach of the Covenant; and (vii) in Spain, aspects of conviction by the highest court which affect fundamental rights can be reviewed by the Constitutional Court through the *amparo* procedure.

4.5 Regarding the alleged violation of article 14, paragraph 1, the State party repeats, citing the ruling of the Constitutional Court, that the author was not left without a defence since the charge of unlawful association was mentioned in the original version of the indictment, was included in the decision to take the case to trial, was part of the final conclusions on the charges and was the subject of lively argument in the oral proceedings. It also cites the judgement of the Supreme Court to indicate that the author spoke openly about the activities which were deemed to constitute unlawful association.

5.1 In a letter dated 3 August 2004, the author asserts that he is not abusing the right to submit communications. The Optional Protocol sets no deadline for submitting complaints. The author states that the last judgement by the domestic courts was that handed down by the Constitutional Court on 28 January 1998, that he received it only in June 2001, and that he submitted his communication in April 2002. He adds that, although he received the decision on his complaint about the right to appeal and the count of unlawful association in December 1997, that was immaterial since, if his application to the Constitutional Court for *amparo* had been successful, he would have had redress for his complaints. Besides, the author says, the State party was partly responsible for citizens being unaware that they could apply to the Committee, since it was reluctant to publicize the Committee's decisions.

5.2 The author maintains that the State party has not respected the right to full review of conviction and sentence as established by the Covenant. He emphasizes that Spain entered no reservation to article 14, paragraph 5, on ratifying the Covenant. The State party's reference to Protocol No. 7 to the European Convention is of no relevance since that Protocol - which Spain has not ratified - is immaterial to the Committee's jurisdiction. He repudiates the State party's assertion that there can be no court higher than the highest court, because Spanish domestic legislation allows for that possibility in the case of judgements handed down by the Administrative Litigation Division of the Supreme Court. As regards the complaint relating to article 14, paragraph 1, the author insists that the Supreme Court decided, on 19 July 1997, not to try him on the charge of unlawful association, and maintains that the Constitutional Court, in its ruling, is careful to deny that that decision by the Supreme Court has any legal validity.

Issues and proceedings before the Committee

Consideration of admissibility

6.1 Before considering any claim contained in a communication, the Human Rights Committee must, in accordance with rule 93 of its Rules of Procedure, decide whether or not the communication is admissible under the Optional Protocol to the Covenant.

6.2 The Committee has ascertained that the same matter is not being examined under another procedure of international investigation or settlement for the purposes of article 5, paragraph 2 (a), of the Optional Protocol. It also observes that the State party has put forward nothing to suggest that there are still remedies to exhaust under domestic law, and therefore finds no impediment to its consideration of the communication under article 5, paragraph 2 (a), of the Optional Protocol.

6.3 The Committee notes the State party's argument that the complaint represents an abuse of the right to submit communications owing to the excessive delay in the submission of the complaint and the fact that the issues before the Committee have been settled, with explanatory reasoning, by the domestic courts. As regards the supposedly excessive delay in submitting the complaint, the Committee points out that the Optional Protocol sets no deadline for submitting communications, that the amount of time that elapsed before submission does not in itself constitute an abuse of the right to submit and that, in exceptional circumstances, the Committee can ask for a reasonable explanation of the delay.[1] In the present case, the Committee observes that the issues the author has brought before it were finally resolved by the Constitutional Court in December 1997 and that a second group of claims by the author which, if accepted, might have annulled his conviction, were rejected by the Constitutional Court in January 1998. The author maintains that he gained access to the 1998 ruling only in June 2001, when the Constitutional Court rejected, on the merits, a claim by the author unrelated to his complaint before the Committee. In the light of the circumstances of the case, the Committee considers that the communication cannot be described as an abuse of the right to submit.

6.4 On the complaint relating to article 14, paragraph 1, of the Covenant, the Committee notes the author's comment that the charge of unlawful association was omitted from the indictment and the State party's observations to the effect that the trial did indeed cover that charge. It observes that whether the charge was included in the indictment is a matter of fact which in principle the domestic courts must determine unless their determination is manifestly arbitrary or constitutes a denial of justice. The documents supplied by the author show that criminal procedure in Spain allows indictments to be brought by individuals in addition to the indictment by the Attorney-General and that, while the Supreme Court ruling of 19 July 1997 to which the author alludes does omit various charges from one of the individual indictments, including the charge against the author of unlawful association, it did not omit the charge against him of unlawful association presented in the indictment by the Attorney-General and another of the individual indictments. The Committee considers that the author has not adequately substantiated for purposes of admissibility his complaint relating to article 14, paragraph 1, of the Covenant, and concludes that this part of the communication is inadmissible under article 2 of the Optional Protocol.

6.5 The Committee considers that the remainder of the communication raises issues under article 14, paragraph 5, of the Covenant, declares it admissible and proceeds to consider the communication on its merits.

Consideration on the merits

7. On the complaint relating to article 14, paragraph 5, the Committee observes that the author was tried by the highest court in the land because among the others accused in the case were a member of the Senate and a member of the Congress of Deputies, and under Spanish law trials of cases involving two members of Parliament are to be conducted by the Supreme Court. It takes note of the State party's arguments that conviction by the highest court is compatible with the Covenant and that this is a common situation in many States parties to the Covenant. However, article 14, paragraph 5, of the Covenant provides that everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to the law. The Committee considers that the phrase "according to the law" was not intended to mean that the very existence of the right to review should be left to the discretion of the States parties. Although the legislation of the State party provides that under some circumstances a person, by reason of his office, is to be judged by a higher tribunal than would ordinarily be the case, that circumstance cannot of itself detract from the right of an accused to have his conviction and sentence reviewed by a higher tribunal. The Committee therefore concludes that the facts as set forth in the communication represent a violation of article 14, paragraph 5, of the Covenant.[2]

8. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts before it disclose a violation of article 14, paragraph 5, of the Covenant.

9. Pursuant to article 2, paragraph 3 (a), of the Covenant, the State party should afford the author an effective remedy and take the necessary steps to ensure that similar violations are not repeated in the future.

10. Bearing in mind that, by becoming party to the Optional Protocol, the State party has recognized the competence of the Committee to determine whether there has been a violation of the Covenant or not and that, pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the Covenant and to provide an effective and enforceable remedy in case a

violation has been established, the Committee wishes to receive from the State party, within 90 days, information about the measures taken to give effect to its Views. The State party is also requested to publish the Committee's Views.

[Adopted in English, French and Spanish, the Spanish text being the original version. Subsequently to be issued in Arabic, Chinese and Russian as part of the Committee's annual report to the General Assembly.]

Notes

[1] See communication Nos. 787/1997, *Gobin v. Mauritius*, decision dated 16 July 2001, para. 6.3, and 1434/2005, *Fillacier v. France*, Views dated 28 April 2006, para. 4.3.

[2] See, in this regard, communication No. 1073/2002, *Terrón v. Spain*, Views dated 5 November 2004, para. 7.4.

NN. Communication No. 1218/2003, *Platonov v. Russian Federation* (Views adopted on 1 November 2005, eighty-fifth session)[*]

Submitted by: Andrei Platonov (not represented by counsel)

Alleged victim: The author

State party: Russian Federation[1]

Date of communication: 27 May 2003 (initial submission)

Subject matter: Unlawful detention, torture, unfair trial, examination of witnesses

Substantive issues: Exhaustion of domestic remedies, degree of substantiation of claims

Procedural issues: Exhaustion of domestic remedies

Articles of the Covenant: 2, 7, 9 (2), (3), (4), 10, 14 (3) (e) and (g)

Articles of the Optional Protocol: 2, 3, 5 (2) (b)

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 1 November 2005,

Having concluded its consideration of communication No. 1218/2003, submitted to the Human Rights Committee by Andrei Platonov under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the author of the communication, and the State party,

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[*] The following members of the Committee participated in the examination of the present communication: Mr. Nisuke Ando, Mr. Prafullachandra Natwarlal Bhagwati, Mr. Alfredo Castillero Hoyos, Ms. Christine Chanet, Mr. Maurice Glèlè Ahanhanzo, Mr. Walter Kälin, Mr. Ahmed Tawfik Khalil, Mr. Michael O'Flaherty, Ms. Elisabeth Palm, Mr. Rafael Rivas Posada, Mr. Ivan Shearer, Mr. Hipólito Solari-Yrigoyen, Ms. Ruth Wedgwood and Mr. Roman Wieruszewski.

Adopts the following:

Views under article 5, paragraph 4, of the Optional Protocol

1. The author is Andrei Platonov, a Russian citizen born in 1955, currently imprisoned in Chelyabinsk, Russian Federation. He claims to be a victim of violations by the Russian Federation of articles 2; 7; 9, paragraphs 2, 3 and 4; 10; and 14, paragraph 3 (e) and (g), of the International Covenant on Civil and Political Rights. He is not represented by counsel.

Factual background

2.1 On 22 February 1999, the author was arrested on suspicion of murder and placed in detention. His arrest and detention were approved by the Procurator on 24 February 1999. Between 22 and 24 February 1999, the author allegedly was beaten by policemen in order to force him to confess. Unable to withstand the beatings, he confessed. The author sought and was provided with medical assistance; he adds that the medical history file records the fact that he had sustained injuries. He also states that, when he wrote out his confession, he was still bleeding from a head wound sustained during the beatings, and that traces of his blood can be seen on the confession document. He contends that, although he filed a complaint about being subjected to beatings in detention, the Office of the Procurator General refused to open a criminal case to investigate the allegations of torture by the policemen.

2.2 The author contends that following his arrest, he was not given an opportunity to consult a lawyer, and was not brought before a judge or other officer authorized by law to exercise judicial power to allow him to challenge the legality of his detention.

2.3 On 31 January 2000, the Moscow City Court convicted the author on two counts of murder and one count of robbery, and sentenced him to 20 years' imprisonment.

2.4 The author claims that during his trial, he retracted his confession, but the judge did not react to his retraction and proceeded to base her findings in large part on his confession. The request of his lawyer for a forensic analysis of the stains on the confession document was denied by the court. The decision of the Moscow City Court indicates that the judge considered Platonov's retraction of his confession to be a "defence strategy" aimed at escaping responsibility for the crimes committed. She noted that Platonov's complaint about the "unlawful methods of investigation" was looked into during the preliminary investigation and was found to be unsubstantiated. In these circumstances, the judge admitted Platonov's confession into evidence.

2.5 The author alleges that he did not receive a fair trail. He contends that the court relied on circumstantial evidence and largely contradictory testimony from various prosecution witnesses. Despite the failure of one important defence witness, Gashin, to appear in court and give evidence, the judge failed to take steps to ascertain his whereabouts and compel his appearance.

2.6 The author submits that his forced confession and the circumstantial and contradictory testimony of various witnesses were not corroborated by other evidence. The murder weapon was never found and the court did not properly investigate alternative versions of how the crime was committed. In its decision, the court relied on forensic analysis of blood found on the author's clothes, which found it to be of the same blood type as the two murder victims. The Court ignored the fact that the author has the same blood type.

2.7 The author appealed on cassation against his conviction in the Supreme Court. On 19 July 2000, the Supreme Court rejected the appeal and upheld the verdict of the Moscow City Court. The Court found that there was no basis to challenge the factual findings of the Moscow City Court, and that there was no basis to conclude that the author had been subjected to "unlawful investigatory methods by the police".

The complaint

3. The author claims that his arrest, ill-treatment in custody, and the manner his trial was conducted, amount to violations of articles 7; 9, paragraphs 2, 3 and 4; 10; and 14, paragraphs 3 (e) and (g), of the Covenant. He adds that he was not afforded a remedy for the violation of his Covenant rights, in breach of article 2, paragraph 3, of the Covenant.

The State party's observations on admissibility and merits

4.1 By note verbale of 23 March 2004, the State party submits that the communication should be declared inadmissible with regard to the alleged violation of article 7 in conjunction with article 14, paragraph 3 (g), and that in any event the communication does not reveal violations of the relevant provisions of the Covenant.

4.2 In relation to the author's claims under article 7, the State party submits that the author failed to exhaust domestic remedies, as he did not appeal against the refusal of the Office of the Procurator General to open a criminal case to investigate the author's allegations of torture.

4.3 As to the alleged violation of article 14, paragraph 3 (e), the State party submits that it has not been substantiated. The author did not have the opportunity to examine the witness Gashin because his whereabouts were unknown, but the prosecution was also deprived of the opportunity to examine this witness. Thus, the procedural opportunities available to the defence and the prosecution were equal. The defence never applied to have Gashin summoned to court; his testimony during the preliminary investigation was not relied upon, and the court did not refer to it in its judgement. It follows that the allegation of a violation of article 14, paragraph 3 (e), has not been substantiated and is inadmissible.

4.4 The State party also submits that the communication does not reveal a violation of article 9, paragraphs 2 to 4. It notes that the author's arrest was made in accordance with the procedural requirements of the legislation in force at the time of the arrest. The arrest was made with the approval of the Procurator and within the relevant time limits allowed for detention. The author had a right to appeal his detention in court and subsequently file a complaint in cassation; he chose not to do so. Accordingly, the State party submits that the author did not exhaust domestic remedies available to him to challenge the legality of his detention, and his complaint related to article 9 should is also inadmissible.

4.5 The State party does not comment on the alleged violations of articles 10 and 2, paragraph 3, of the Covenant.

Author's comments on the State party's submissions

5.1 In his comments on the State party's submission dated 31 May 2004, the author concedes that, in relation to the alleged violation of article 7 read together with article 14, paragraph 3 (g), he did not directly appeal the refusal of the Office of the Procurator General to open a criminal investigation into the allegations of torture; he claims, nonetheless, that he did in fact "raise the question" of beatings and a forced confession in the course of his appeal before the Supreme Court. The Court dismissed the claim without giving reasons.

5.2 The author contends that, although neither prosecution nor defence had an opportunity to examine Mr. Gashin in court, his rights under article 14 paragraph (3) (e), were nonetheless violated. He alleges that the Procurator General did not insist on having Mr. Gashin's whereabouts ascertained and his appearance secured because his testimony would have jeopardized the prosecution's case.

5.3 Finally, he argues that the Constitution of the Russian Federation stipulates that international obligations are part of, and take precedence over, domestic legal norms in force at the time. Thus, even if his arrest and detention were made in accordance with the requirements of the Code of Criminal Procedure then in force, this is not a defence to the claim that the author's rights under article 9 were violated.

5.4 On 24 November 2004, the State party reiterated that the author's allegations are either inadmissible or do not disclose a violation of the Covenant.

Issues and proceedings before the Committee

Consideration of admissibility

6.1 Before considering any claim contained in a communication, the Human Rights Committee must, in accordance with rule 93 of its Rules of Procedure, decide whether or not the case is admissible under the Optional Protocol to the Covenant.

6.2 The Committee has ascertained, as required under article 5, paragraph 2 (a), of the Optional Protocol, that the same matter is not being examined under another procedure of international investigation or settlement.

6.3 Concerning the author's claim of a violation of article 7, the Committee notes that after the Office of the Procurator General refused to open a criminal case and to investigate the allegations of torture against the policemen allegedly involved in his arrest, the author did not appeal to court the above refusal to investigate his claim. As a result, the Committee concludes that the author has failed to exhaust domestic remedies with respect to his claim under article 7. It further transpires that the author's claim under article 10 is based on much the same facts presented in connection with the claim under article 7; the Committee thus considers it unnecessary to examine it, in light of its conclusion on the article 7 claim.

6.4 The Committee takes note of the fact that the author was informed, upon his arrest on 22 February 1999, of the reasons for the arrest and the charges against him. Therefore, his allegation relating to article 9, paragraph 2, is unsubstantiated, and accordingly inadmissible under article 2 of the Optional Protocol.

6.5 With regard to the author's allegations under article 9, paragraph 4, of the Covenant, the Committee notes that the author failed to appeal the detention order and did not raise the issue of unlawful detention at any point during his trial. Accordingly, this claim in inadmissible pursuant to article 5, paragraph 2 (b), of the Optional Protocol.

6.6 In relation to the author's claim of a violation of article 14, paragraph 3 (e), in that the court failed to take action to establish the whereabouts of Mr. Gashin and secure his attendance, the Committee has noted the State party's contention that the author did not apply to have that particular witness summoned to appear in court. The trial records indicate that the court continued proceedings after the failure of Mr. Gashin to appear in court, with agreement of both the Prosecutor and the accused. Accordingly, the author has failed to exhaust domestic remedies in relation to these claims and they are accordingly inadmissible under article 5, paragraph 2 (b), of the Optional Protocol.

6.7 In relation to the author claims that, in violation of article 14, paragraph 3 (g), he was forced to testify against himself and was further convicted largely on the basis of this confession, the Committee notes that the Moscow City Court and the Supreme Court concluded that his allegations of the use of unlawful investigatory methods by the police were unsubstantiated. The Committee observes that, in substance, this part of the communication relates to an evaluation of elements of facts and evidence. It refers to its prior jurisprudence and reiterates that it is generally for the appellate courts of States parties to the Covenant to evaluate facts and evidence in a particular case, unless it can be ascertained that this evaluation was clearly arbitrary or amounted to a denial of justice.[2] The material before the Committee does not show that the courts' examination of the above allegations suffered from such defects. Accordingly, this part of the communication is inadmissible as incompatible with the provisions of the Covenant, pursuant to article 2 of the Optional Protocol.

6.8 The Committee decides that the remaining claim of the author is sufficiently substantiated, as far as it raise issues under article 9, paragraph 3, and proceeds to its examination on the merits.

Consideration of the merits

7.1 The Human Rights Committee has considered the present communication in the light of all the information made available to it by the parties, as provided in article 5, paragraph 1, of the Optional Protocol.

7.2 The Committee notes that, after his arrest on 22 February 1999, the author's pretrial detention was approved by the public prosecutor, until the author was brought before a court and convicted on 31 January 2000. The Committee observes that article 9, paragraph 3, is intended to bring the detention of a person charged with a criminal offence under judicial control and recalls that it is inherent to the proper exercise of judicial power, that it be exercised by an authority which is independent, objective and impartial in relation to the issues dealt with.[3] In the circumstances of the instant case, the Committee is not satisfied that the public prosecutor could be characterized as having the institutional objectivity and impartiality necessary to be considered an "officer authorized to exercise judicial power" within the meaning of article 9, paragraph 3. The Committee therefore concludes that there has been a violation of this Covenant provision.

8. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts before it disclose a violation of article 9, paragraph 3, of the International Covenant on Civil and Political Rights.

9. Pursuant to article 2, paragraph 3 (a), of the Covenant, the Committee considers that the author is entitled to an effective remedy, including appropriate compensation. The State party is also under an obligation to take effective measures to ensure that similar violations do not recur.

10. Bearing in mind that, by becoming a party to the Optional Protocol, the State party has recognized the competence of the Committee to determine whether there has been a violation of the Covenant or not, and that, pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory or subject to its jurisdiction the rights recognized in the Covenant and to provide an effective and enforceable remedy in case a violation has been established, the Committee wishes to receive from the State party, within 90 days, information about the measures taken to give effect to the Committee's views.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the Committee's annual report to the General Assembly.]

Notes

[1] The Optional Protocol entered into force for the Russian Federation on 1 January 1992.

[2] See, for example, *Errol Simms v. Jamaica*, communication No. 541/1993, Inadmissibility decision adopted on 3 April 1995.

[3] See, for example, communication No. 541/1992, *Vladmir Kulomin v. Hungary*, Views adopted on 22 March 1996.

OO. Communication No. 1238/2003, *Jongenburger Veerman v. Netherlands* (Views adopted on 1 November 2005, eighty-fifth session)*

Submitted by:	G. J. Jongenburger-Veerman (represented by counsel, Mr. F.A.J. Kalberg)
Alleged victim:	The author
State party:	The Netherlands
Date of communication:	7 August 2003 (initial submission)
Subject matter:	Special widow's pension rights
Procedural issues:	Exhaustion of domestic remedies
Substantive issues:	Discrimination under article 26 of the Covenant
Articles of the Covenant:	14 (1), 26
Articles of the Optional Protocol:	5 (2) (b)

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 1 November 2005,

Having concluded its consideration of communication No. 1238/2004, submitted to the Human Rights Committee on behalf of G. J. Jongenburger-Veerman under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the author of the communication, and the State party,

Adopts the following:

Views under article 5, paragraph 4, of the Optional Protocol

1. The author of the communication, dated 7 August and 17 October 2003, is Mrs. G. J. Jongenburger-Veerman, a Dutch national, born on 18 July 1911. She claims to be a

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* The following members of the Committee participated in the examination of the present communication: Mr. Nisuke Ando, Mr. Prafullachandra Natwarlal Bhagwati, Mr. Alfredo Castillero Hoyos, Ms. Christine Chanet, Mr. Maurice Glèlè Ahanhanzo, Mr. Walter Kälin, Mr. Ahmed Tawfik Khalil, Mr. Michael O'Flaherty, Ms. Elisabeth Palm, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Ivan Shearer, Mr. Hipólito Solari-Yrigoyen, Ms. Ruth Wedgwood and Mr. Roman Wieruszewski.

victim of a violation by the Netherlands of article 26 of the International Covenant on Civil and Political Rights (the Covenant). She is represented by counsel. The Optional Protocol entered into force for the Netherlands on 11 March 1979.

Factual background

2.1 In January 1976, the author's 40 year marriage was dissolved by the court upon request by her husband, from whom she lived separated since 1952. The husband was a former employee of the Assistance Corps of Netherlands New Guinea (*Bijstandskorps van burgerlijke rijksambtenaren*) which was dissolved on 5 July 1967. Under the Assistance Corps Act (*Wet op het Bijstandskorps*) of 25 May 1962, all employees of the Assistance Corps enjoyed the status of Dutch public servants. The author's ex-husband died on 25 March 1991.

2.2 The issue of pensions for surviving relatives of former employees of the Assistance Corps of Netherlands New Guinea is not regulated by the Public Servants Superannuation Act (*Algemene Burgerlijke Pensioenwet*) but by special legislation, namely the Pension Scheme Rules and Regulations for Netherlands New Guinea (*Pensioensreglement Nederlands Nieuw-Guinea*) (PRNG), of 29 December 1958. These Rules and Regulations do not provide for pensions to divorced widows of former public servants. However, under a hardship clause contained in article 31 of PRNG, a pension can be granted in special cases for which the Regulations do not provide.

2.3 On 1 January 1966, in light of a change in the divorce legislation, a new section G 4 was introduced in the Public Servants Superannuation Act, providing for a special pension for divorced widows of public servants. On 6 February 1973, Article 8 (a) of the Pensions and Savings Fund Act (*Pensioen en Spaarfondsenwet*) was adopted, providing that all pension regulations should provide the possibility of a special pension for divorced widows. The PRNG was not amended accordingly.

2.4 After the decease of her ex-husband, the author applied to the Minister of the Interior for a special widow's pension with effect from 26 March 1991. On 12 July 1991, the Minister of the Interior rejected the author's application, based on his discretionary power under the hardship clause of Article 31 PRNG. Her objection against that decision was rejected on 16 October 1991. The author's appeal to the Judicial Division of the Council of State (*Afdeling Rechtspraak van de Raad van State*) was dismissed on 18 May 1993.

2.5 On 1 March 1999, the author again applied to the Administration of the Indonesian Pensions Fund (*Stichting Administratie Indonesische Pensioenen*) (SAIP), mandated since 1995 to administer the New-Guinea pensions, to grant her a special widow's pension effective from 26 March 1991, based on an analogous application of section G 4 of the Public Servants Superannuation Act, as well as article 8 (a) of the Pensions and Savings Funds Act. On 29 November 1999, following instructions by the Minister of the Interior who considered that the absence of a right to a special widow's pension was no longer in keeping with the prevailing attitudes in society, the SAIP granted her a special widow's pension with effect from 1 January 1999, pursuant to article 31 PRNG. The author challenged this decision, insofar as it denied her a pension for the period between 26 March 1991 and 31 December 1998. On 2 March 2000, the SAIP rejected her objection.

2.6 The author's appeal to the District Court of The Hague, administrative law section, (*Arrondissementsrechtbank 's-Gravenhage, afdeling bestuursrecht*) in which she also claimed violations of article 1 of the Dutch Constitution (equality principle) and article 26 of the Covenant, was dismissed on 14 August 2000. On 9 August 2001, the Central Appeals Tribunal (*Centrale Raad van Beroep*) in Utrecht dismissed her further appeal, holding that the author's request in 1999 was substantially the same as her request in 1991, and that, because the decision in that case had become final and conclusive, it should be respected unless it was manifestly arbitrary or unless new developments had occurred that would make it unreasonable not to quash it. The Tribunal did not find such circumstances and considered that the difference in treatment was the result of a policy decision of the legislator to distinguish between the overseas and European territories of the State, which was based on reasonable and objective criteria. Similarly, the Court found that the decision to grant the author a special widow's pension with effect from 1 January 1999 only was within the Minister's discretion under article 31 PRNG.

The complaint

3.1 The author alleges a violation of her rights under article 26 of the Covenant, arguing that her application for a special widow's pension should have been determined on the same legal basis as special widow's pensions for the survivors of all other public servants in the Netherlands. In this context she refers to declarations made by the State Secretary for Home Affairs during the public reading in Parliament on 9 May 1962 of the Assistance Corps Act, to the effect that civil servants of the Assistance Corps would be treated analogously to their Dutch counterparts. She argues that following the adoption of section G4 in the Public Servants Superannuation Act in 1966, the PRNG should have been amended accordingly, as this showed the acceptance of a divorced survivor's right to a (partial) widow's pension.

3.2 With reference to the Human Rights Committee's jurisprudence that it is not for the Committee to review the facts and evidence that were brought before the courts of the State party, the author argues that this should not be an obstacle in her case, as the Judicial Division of the Council of State which decided on her appeal in 1993 is not an independent and impartial tribunal, since it advised the Minister of the Interior to adopt the pertinent legislation which distinguishes between widows of former employees of the Assistance Corps, on one hand, and those of other public servants, on the other hand.[1] The author concludes that the lack of objective impartiality of the Judicial Council is thus in violation of article 14, paragraph 1, of the Covenant. Moreover, the author submits that the Judicial Council was not competent to deal with her appeal against the Minister's decision of 16 October 1991, as the Council of Appeal (*Raad van Beroep*) would have been the competent court to deal with appeals relating to public servants, including former employees of the Assistance Corps. Instead of directing her to the competent tribunals, the advice on applicable remedies in the Minister's decision had falsely indicated the Judicial Council as the competent appeals tribunal. The decision of the Judicial Council should thus be considered null and void.

3.3 The author claims that she has exhausted domestic remedies, as no further appeal is available from the judgement of the Central Appeals Tribunal, and that the same matter is not being examined under another procedure of international investigation or settlement.

State party's submissions

4.1 By submission of 23 March 2004, the State party argues that the claim under article 14 of the Covenant is inadmissible because the author has not raised this issue in the domestic proceedings and thus failed to exhaust domestic remedies in this respect.

4.2 By submission of 24 July 2004, the State party explains that the author could have challenged the lack of impartiality of the Council of State in her notice of appeal or in her pleading, but instead she raised the issue eleven years after her case was heard. The State party further argues that the author has failed to substantiate her claim that there was a lack of independence and impartiality. The State party explains that the advisory and judicial tasks are carried out by different departments within the Council and that all members of the Council are appointed for life and that their independence is guaranteed like for members of other judicial bodies.[2] Likewise, the author's argument that the Council of State was not competent to deal with her claims could have been raised at the time. The State party concludes that this part of the communication should be declared inadmissible or alternatively ill-founded.

4.3 With regard to the author's claim that she should be treated equally with widows of former civil servants in the Netherlands, the State party explains that, after Dutch divorce law was reformed in 1971, the legislator purposely made no provision in the PRNG in 1971 for the specific group of widows to which she belongs. This position was explained in a letter from the Minister to Parliament on 19 August 1971. The State party states that upon the transfer of administrative responsibility for the former overseas territories of the Dutch East Indies and New Guinea, the Netherlands undertook to award and pay pensions to widows of former civil servants in these territories. Under the agreement regulating the transfer, the Netherlands guaranteed entitlements as they existed at the time of the transfer. Entitlements for a widow's pension at the time were to the woman to whom the deceased was married before age 65 and to whom he was still married at the time of his death. The State party thus argues that its obligations with regard to widow's pensions under these schemes are therefore limited to rights and entitlements accrued some time ago. An amendment of the regulations in line with the revised divorce law would have entailed a departure from the policy followed hitherto and moreover infringed the rights of the last wife/widow, who no longer would have been entitled to the full pension. According to the State party, the problem of sharing entitlements among previous wives was not an issue in the introduction of divorce law into Dutch pension schemes. The State party thus argues that in this sense the widows/wives of former civil servants of overseas territories were not in the same position as the widows/wives of civil servants covered by a Dutch pension scheme. The State party adds that it was recognized that the court establishing the financial arrangements in a divorce case could take this situation into account.

4.4 When considering the author's case, the Judicial Division of the Council of State accepted the Minister's arguments that the difference in treatment did not infringe the right to equality since the cases in question were not the same as they related to different categories of civil servants. Moreover, it was considered relevant that, when the author's marriage was dissolved, the loss of entitlement to a widow's pension under the PRNG was taken into account in that her husband made provision for her, which the court considered to be reasonable.

4.5 The State party explains that the Minister's decision in 1999 to award the author a special widow's pension did not stem from the above arguments ceasing to be valid, but was rather prompted by the fact that the prevailing attitudes towards married women's pension entitlements had moved on to such an extent as to be incompatible with the lack of entitlement to special widow's pension. The basis of the award was not the principle of equal treatment but the hardship clause in the PRNG.

4.6 The State party therefore concludes that there has been no breach of the principle of equality contained in article 26 of the Covenant.

Author's comments

5.1 By letter of 14 September 2004, the author comments on the State party's observations and maintains that article 14 of the Covenant has been violated because the Judicial Division of the Council of State was not competent to decide on her appeal in 1993. She moreover maintains that it lacked objective impartiality.

5.2 As to the State party's arguments why the difference in treatment does not constitute a violation of the rights to equality, the author takes issue with the State party's reference to the situation of former civil servants in the Dutch East Indies. She explains that there is a difference in legal status between the former civil servants in the East Indies and the members of the Assistance Corps New Guinea. The former are subject to an agreement with Indonesia whereas the status of the latter was laid down in the Assistance Corps Act of 25 May 1962 and regulated by Dutch law. She argues therefore that the PRNG is a Dutch pension scheme and not, as the State party suggests an overseas pension scheme.

5.3 The author recalls that the PRNG was drafted in 1957-58 when the concept of special widow's pension had not yet been introduced into Dutch law. She states that the PRNG reflects Dutch law, and especially the Public Servants Superannuation Act, as it was at the time. According to the author, there was therefore no reason not to amend it accordingly when the special widow's pension was introduced into the Public Servants Superannuation Act in 1966 or at the latest in 1973 when the special widow's pension was made obligatory for all pension schemes. She states in this respect that a number of other amendments have been introduced in the PRNG to adapt it to developments in Dutch legislation, for instance to expand the notion of orphans entitled to a pension.

5.4 The author recalls that she was married throughout the period in which her husband worked in New Guinea and that all premiums were paid for the widow's pension, to which no one else could have been entitled than she. The adaptation of the PRNG would have had no international consequences, unlike the adaptation of the pensions for the former Dutch East Indies civil servants. She maintains therefore that the failure to grant her a special widow's pension based on equality with all other divorced widows under Dutch law constitutes a violation of article 26 of the Covenant.

Issues and proceedings before the Committee

Consideration of admissibility

6.1 Before considering any claim contained in a communication, the Human Rights Committee must, in accordance with rule 93 of its rules of procedure, decide whether or not the communication is admissible under the Optional Protocol to the Covenant.

6.2 The Committee has ascertained that the same matter is not being examined under another procedure of international investigation or settlement for the purposes of article 5, paragraph 2 (a) of the Optional Protocol.

6.3 The Committee has taken note of the State party's objection to the admissibility of the author's claim under article 14 of the Covenant, for failure to exhaust domestic remedies in this respect. The Committee further notes that the author in her comments has not raised any arguments to show that these domestic remedies were not available or not effective. The information before the Committee shows that the author has not raised the question of the lack of impartiality or the lack of competence of the Council of State at the time that her appeal was heard. The Committee finds therefore that this part of the communication is inadmissible under article 5, paragraph 2 (b), of the Optional Protocol.

6.4 In the absence of any further obstacles to the admissibility of the communication the Committee declares the communication admissible with regard to the remaining claim under article 26 of the Covenant.

Consideration of the merits

7.1 The Committee has considered the present communication in the light of all the information made available by the parties, as provided in article 5, paragraph 1, of the Optional Protocol.

7.2 The author has claimed that the failure to grant her a special widow's pension over the years 1991-1998 is in violation of article 26 of the Covenant by the State party. The State party has argued that the distinction made in the relevant legal provisions relates to different categories of civil servants. It has moreover argued that the fact that the author would lose her entitlement to a widow's pension was taken into account at the time of her divorce and that arrangements were made to compensate this loss, which the Court at the time considered reasonable, and the author has not challenged this part of the State party's observations. The Committee recalls its jurisprudence that not every differentiation based on the grounds listed in Article 26 of the Covenant amounts to discrimination, as long as it is based on reasonable and objective grounds.[3] In the circumstances of the present case, the Committee finds that the distinction between Dutch widows of former employees of the Assistance Corps of Netherlands New Guinea and widows of other former Dutch civil servants is not based on any of the relevant characteristics enumerated in Article 26 nor amounts to other status in the sense of this article. Furthermore, the material before the Committee, in particular references to the reasons presented to the legislator in 1971 why the PRNG should not be amended (paragraph 4.3 above), does not disclose a lack of reasonableness and objectivity. Therefore, the failure to grant the author a pension from 1991 to 1998 does not constitute a violation of article 26 of the Covenant.

8. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol, is of the view that the facts before it do not disclose a violation of the International Covenant on Civil and Political Rights.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently to be issued in Arabic, Chinese and Russian as part of the Committee's annual report to the General Assembly.]

Notes

[1] In this context, the author refers to the *Procola v. Luxembourg* judgement of the European Court of Human Rights, Series A, vol. 326.

[2] The State party refers to a recent judgement by the ECHR (*Kleyn and others v. the Netherlands*, 6 May 2003) where a complaint about the alleged lack of impartiality of the Administrative Jurisdiction Division of the Council was declared manifestly unfounded.

[3] See inter alia the Committee's jurisprudence in *Broeks v. the Netherlands* (CCPR/C/29/D/172/1984, para. 13), *Zwaan-de Vries v. the Netherlands* (CCPR/C/29/D/182/1984, para. 13), *H. Vos v. the Netherlands* (CCPR/C/35/D/218/1986, para. 11.3), *Pauger v. Austria* (CCPR/C/44/D/415/1990, para. 7.3), *Müller and Engelhard v. Namibia* (CCPR/C/74/D/919/2000, para. 6.7) and *Derksen v. the Netherlands* (CPR/C/80/D/976/2001, para. 9.2).

PP. Communication No. 1249/2004, *Immaculate Joseph, et al. v. Sri Lanka* (Views adopted on 21 October 2005, eighty-fifth session)*

Submitted by:	Sister Immaculate Joseph and 80 Teaching Sisters of the Holy Cross of the Third Order of Saint Francis in Menzingen of Sri Lanka (not represented by counsel) (not represented by counsel)
Alleged victims:	The authors
State party:	Sri Lanka
Date of communication:	14 February 2004 (initial submission)
Subject matter:	Determination by Supreme Court that incorporation of religious order inconsistent with Constitution
Procedural issues:	Exhaustion of domestic remedies - substantiation, for purposes of admissibility
Substantive issues:	Freedom of religious belief - manifestation of religious belief - freedom of expression - permissible restrictions - equality before the law - discrimination on basis of religious belief
Articles of the Covenant:	Articles 2, paragraph 1, 18, paragraph 1, 19, paragraph 2, 26 and 27
Article of the Optional Protocol:	Articles 2 and 5, paragraph 2 (b)

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 21 October 2005,

Having concluded its consideration of communication No. 1249/2004, submitted to the Human Rights Committee by Sister Immaculate Joseph and 80 Teaching Sisters of the Holy Cross of the Third Order of Saint Francis in Menzingen of Sri Lanka under the Optional Protocol to the International Covenant on Civil and Political Rights,

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* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Prafullachandra Natwarlal Bhagwati, Ms. Christine Chanet, Mr. Maurice Glèlè Ahanhanzo, Mr. Edwin Johnson, Mr. Walter Kälin, Mr. Ahmed Tawfik Khalil, Mr. Rajsoomer Lallah, Mr. Michael O'Flaherty, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Ivan Shearer, Mr. Hipólito Solari-Yrigoyen and Mr. Roman Wieruszewski.

Having taken into account all written information made available to it by the author of the communication, and the State party,

Adopts the following:

Views under article 5, paragraph 4, of the Optional Protocol

1. The author of the communication, initially dated 14 February 2004, is Sister Immaculate Joseph, a Sri Lankan citizen and Roman Catholic nun presently serving as Provincial Superior of the Teaching Sisters of the Holy Cross of the Third Order of Saint Francis in Menzingen of Sri Lanka ('the Order'). She submits the communication on her own behalf and on behalf of 80 other sisters of the Order, who expressly authorize her to act on their behalf. They claim to be victims of violations by Sri Lanka of articles 2, paragraph (1); article 18, paragraph (1); article 19, paragraph (2), article 26 and article 27 of the Covenant. The Optional Protocol entered into force for Sri Lanka on 3 January 1998. The authors are not represented by counsel.

Factual background

2.1 The authors state that the Order, established in 1900, is engaged, among other things, in teaching and other charity and community work, which it provides to the community at large, irrespective of race or religion. In July 2003, the Order filed an application for incorporation, which in Sri Lanka occurs by way of statutory enactment. The Attorney-General, who the authors maintain is required by article 77 of the Constitution to examine every Bill for consistency with the Constitution, made no report to the President. After the Bill was published in the Government Gazette, an objection to the constitutionality of two clauses of the Bill, when read with the preamble,[1] apparently by a private citizen ('the objector'), was filed on 14 July 2003 in the original jurisdiction of the Supreme Court.

2.2 Without advice of the objection or hearing to the Order, the Supreme Court heard the objector and the Attorney-General on the matter. The authors state that the Attorney-General, who was technically the respondent to the proceedings, supported the objector's arguments. On 1 August 2003, the Supreme Court handed down its Special Determination upholding the application, for inconsistency with articles 9 and 10 of the Constitution. The Court held that the challenged provisions of the Bill "create a situation which combines the observance and practice of a religion or belief with activities which would provide material and other benefits to the inexperience [sic], defenseless and vulnerable people to propagate a religion. The kind of [social and economic] activities projected in the Bill would necessarily result in imposing unnecessary and improper pressures on people, who are distressed and in need, with their free exercise of thought, conscience and religion with the freedom to have or to adopt a religion or belief of his choice as provided in article 10 of the Constitution." The Court thus considered that "the Constitution does not recognize a fundamental right to propagate a religion". In reaching its conclusions, the Court referred to article 18 of both the Universal Declaration of Human Rights and the Covenant, as well as two cases decided by the European Court of Human Rights.[2]

2.3 The Court went on to examine the application in the light of article 9 of the Constitution, which provides that: "The Republic of Sri Lanka shall give Buddhism the foremost place and accordingly it shall be the duty of the State to protect and foster the *Buddha Sasana*, while assuring all religions the rights granted by articles 10 and 14 (1) (e)." The Court held, "the propagation and spreading Christianity as postulated in terms of clause 3 [of the Bill] would not be permissible as it would impair the very existence of Buddhism or the *Buddha Sasana*". In addition, subclauses 1 (a) and (b) of clause 3 concerned spreading knowledge of a religion, and were thus inconsistent with article 9 of the Constitution.

2.4 The authors point out that in reaching these conclusions the Court referred to decisions in two previous cases where similar bills for the incorporation of Christian associations had been found to be unconstitutional. The result of the decision, against which no appeal or review was possible, was that Parliament could not enact the Bill into law without a two-thirds special majority and approval by a popular referendum.

The complaint

3.1 The authors claim that the above facts disclose violations of article 2, paragraph 1, read with article 26, article 27, article 18, paragraph 1, and article 19, paragraph 2. As to article 2, paragraph 1, read with article 26, the authors argue that the Attorney-General's submissions in opposition to the Bill and the Supreme Court's determination violated these rights. The Attorney-General, not having recognized any constitutional infirmity under article 77, was obliged as a matter of equality of law to take the same position before the Court, doubly so given that the Order, although the affected entity, was neither notified nor heard. The determination that Clause 3 of the Bill was incompatible with article 9 of the Constitution was moreover so irrational and arbitrary as to breach fundamental norms of equality protected by article 26. With reference to the Committee's decision in *Waldman v. Canada*,[3] the authors argue that to reject the Order's incorporation while many non-Christian religious bodies with similar object clauses have been incorporated violates article 26. In support, the author provides a (non-exhaustive) list of 28 religious bodies that have been incorporated and their statutory objects, of which most have Buddhist orientation, certain Islamic, and none Christian.

3.2 In terms of article 27, the authors invoke the Committee's general comment No. 22 to the effect that the official establishment of a State religion should not impair the enjoyment of others' Covenant rights. The Court's reliance on the Buddhism primacy clause in article 9 to reject the Bill's constitutionality thus violated article 27. The authors emphasize that, like the lengthy list of other religious bodies receiving incorporation, the Order combined charitable and humanitarian activities (labelled social and economic activities by the Court) with religious ones, a practice common to all religions. To require a religious body's adherents to limit good works would be discriminatory, and contrary also to the objects of the other religious bodies that received incorporation. Propagation of belief, moreover, is an integral part of professing and practicing religion; indeed, all major religions in Sri Lanka (Buddhism, Hinduism, Islam and Christianity) were introduced by propagation. In any event, the authors state that in the seventy years of the Order's existence in Sri Lanka, there has neither been evidence nor allegation of inducements or allurements to conversion. This aspect of religious practice is thus protected by the rights of the Order's members under article 27 Covenant.

3.3 In terms of article 18, paragraph 2, and 19, paragraph 2, the authors argue that the Court's restrictions on social and economic activities of the Order breach its members' rights under these provisions. The right to propagate and disseminate information about a religion is similarly covered by these articles, and is not limited to a State's "foremost" religion. None of the Order's activities are coercive, and thus paragraph 2 of article 18 has no application to the Order's legitimate activities. Invoking article 6 of the Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion and Belief as a guide to Covenant interpretation, the author goes on to argue that the inability to hold property in the name of the Order sharply limits its effective ability to establish places of worship and charitable and humanitarian institutions. The Attorney-General's submissions and the Supreme Court's ascription to the Order of potentially coercive activities as a result of incorporation were wholly unsubstantiated and unfounded in fact.

The State party's submissions on admissibility and merits

4.1 By submissions of 15 April 2004 and 21 March 2005, the State party contested the admissibility and merits of the communication. At the outset, the State party described its understanding of the allegations as three-fold: (a) that the author was not afforded an opportunity of being heard before the Supreme Court prior to the Court making its determination, (b) that the Attorney-General supported the petitioner's submissions before the Supreme Court, and (c) that the Supreme Court's determination itself violated the author's Covenant rights.

4.2 As to the allegation that the authors were not afforded an opportunity of being heard before the Supreme Court prior to the Court making its determination, the State party explains that under article 78 of the Constitution, any Bill shall be published in the Government gazette at least seven days before being placed on the Order paper of Parliament. The Constitution then lays down the procedure to be followed when a Bill is placed on the Order paper in Parliament. The Supreme Court is vested, under article 121 of the Constitution, with sole and exclusive jurisdiction to determine whether a Bill or any provision thereof is inconsistent with the Constitution. This jurisdiction may be invoked by the President by written reference to the Chief Justice, or by any citizen addressing the Court in writing. Either application must be filed within a week of the Bill being placed on the Order paper of Parliament.

4.3 When the Court's jurisdiction has thus been invoked, no Parliamentary proceedings may be held in relation to the Bill until three weeks have elapsed or the Court has determined the matter, whichever occurs first. The Court's proceedings take place in open court, and any person claiming to be interested in the determination of the question can make an application to the Court for intervenor status. The Court communicates its determination to the President or the Speaker within three weeks of the application. In the event that the Court finds an inconsistency, a special majority of two-thirds of all members of Parliament must pass the Bill, while if the Bill is in relation to articles 1 to 3 or 6 to 11, a people's referendum must also approve the Bill. The members of Parliament are aware when any Bill has been placed on the Order paper in Parliament.

4.4 The State party explains that the current Bill was presented as a Private Member's Bill. As such, it had not been examined by the Attorney-General under article 77 of the Constitution, and the Attorney-General expressed no view on it. If the authors had wished to intervene in the proceedings, they should have been vigilant to check with the Court's Registry if any application had been filed with the Registry within a week of the Bill being placed upon the Parliamentary Order paper. Had such due diligence been exercised and an intervenor application been made, there is no apparent reason why the Court would have refused the application, which would have been unprecedented. Rather than being a situation of denial of an opportunity to be heard therefore, it was a clear case of an author not taking proper steps to avail herself of the opportunity and the authors are now estopped from claiming otherwise.

4.5 As to the allegation that the Attorney-General supported the petitioner's submissions before the Supreme Court, the State party observes that when article 121 of the Constitution is invoked, the Constitution provides for the Attorney-General to be notified and to be heard. At that point, s/he is expected to consider the objections raised to the constitutionality of the item under reference and assist the Court in its determination. While the Attorney-General had not previously expressed a view on the Bill's constitutionality, the Bill being a private Bill, even if s/he had, it would be manifestly wrong and untenable to suggest s/he would be bound by that earlier determination when addressing the issue in article 121 proceedings.

4.6 As to the contention that the Supreme Court's determination itself violated the authors' Covenant rights, the State party argues that the Supreme Court is not empowered to change the Constitution but only to interpret it within the framework of its provisions. The Court considered the submissions made, took into consideration previous determinations and gave reasons for its conclusions. In any event, the authors, having failed to exercise due diligence to secure their right to be heard, are estopped from contesting the Court's determination in another forum. As a result, with respect to all three allegations, the State party argues that the authors have failed to exhaust domestic remedies.

4.7 The State party goes on to argue that the Supreme Court's determination does not prevent the authors from carrying on their previous activities in Sri Lanka. The State party argues that the Court's determinations in article 121 proceedings do not bind lower courts, and thus lower courts will not be compelled to restrict their right to engage in legitimate religious activity. Nor, for its part, does the Supreme Court's determination do so.

4.8 Moreover, the Court's determination does not prevent Parliament from passing the Bill, which, while inconsistent with articles 9 and 10 of the Constitution could still be passed by a special majority and referendum. Alternatively, the constitutionally impugned provisions of the Bill could be amended and the Bill resubmitted.

Authors' comments on the State party's submissions

5.1 By letter of 30 May 2005, the authors argue that the State party has confined itself to responding to three incidental allegations which do not form the core of the authors' case. The authors argue that the issue is not whether the Court's determination prevents her from carrying on her activities, but rather whether there was a violation of Covenant rights, for the reasons detailed in the complaint. There is no remedy in domestic law against the Supreme Court's determination, which is final and thus the merits thereof are appropriately before the Committee.

5.2 As to the State party's response concerning the opportunity of being heard, the authors emphasize that only the Speaker and Attorney-General receive mandatory notice of an article 121 application, with there being no requirement to notify affected parties such as, in the present case, those involved in a Bill to incorporate a body. In some cases of Private member's Bills, the Supreme Court has adjourned the hearing and notified the concerned member of Parliament if s/he wishes to be heard.[4] In the present case, neither the relevant member of Parliament nor the authors were notified, amounting to a violation of article 2, paragraph 1, in connection with article 26 of the Covenant.

5.3 The authors argue that if the Attorney-General could deviate, in article 121 proceedings, from constitutional advice earlier provided, the whole purpose of the earlier advice would be rendered nugatory. The ability to change such opinions at will would leave room for gross abuse and undoubtedly affect the rights of individuals, contrary to article 21, in connection with article 26 of the Covenant. The authors go on to argue that the State party's response to the Covenant challenge to the Supreme Court's determination, to the effect that the Court made determination within the applicable legal framework, is insufficient answer to her complaint.

Issues and proceedings before the Committee

Consideration of admissibility

6.1 Before considering any claim contained in a communication, the Human Rights Committee must, in accordance with rule 93 of its rules of procedure, decide whether or not the communication is admissible under the Optional Protocol to the Covenant.

6.2 With respect to the exhaustion of domestic remedies, the Committee notes the State party's argument that the authors did not exercise due diligence with respect to confirming through the Parliamentary order paper and then Supreme Court's registry whether an application under article 121 of the Constitution had been lodged, and accordingly filing a motion wishing to be heard. The Committee considers that, exceptional *ex parte* circumstances of urgency apart, when a Court hears an application directly affecting the rights of a person, elementary notions of fairness and due process contained in article 14, paragraph 1, of the Covenant require the affected party to be given notice of the proceeding, particularly when the adjudication of rights is final. In the present case, neither members of the Order nor the member of Parliament presenting the Bill were notified of the pending proceeding. Given not least that in previous proceedings the Court, on the information before the Committee, had notified members of Parliament in such proceedings, the authors thus cannot be faulted for failing to introduce an intervenor's motion before the Court. The Committee observes that there may in any event be issues as to the effectiveness of this remedy, given the requirement that complex constitutional questions, including relevant oral argument, be resolved within three weeks of a challenge being filed, the challenge itself coming within a week of a Bill's publication in the Order paper. It follows that the communication is not inadmissible for failure to exhaust domestic remedies.

6.3 As to the claim that the authors' rights under articles 2 and 26 of the Covenant were violated by the Attorney-General contesting the constitutionality of the Bill before the Court in circumstances where s/he had previously expressed no view of constitutional infirmity, the State party has explained without rebuttal that the Attorney-General's duty to pass on the constitutionality of Bills at the initial stage does not apply to Private member's Bills such as the present. Accordingly, the Attorney-General's views expressed in the article 121 proceedings were his or her first formal views on the matter and were not precluded by a previously taken view. As a result, the Committee considers that this claim is insufficiently substantiated, for purposes of admissibility, and is accordingly inadmissible under article 2 of the Optional Protocol.

6.4 In the absence of any other objections to the admissibility of the communication, and recalling in particular that the Covenant guarantees in articles 18 and 27 freedom of religion exercised in community with others, the Committee considers the remaining claims as pleaded to be sufficiently substantiated, for purposes of admissibility, and proceeds to their consideration on the merits.

Consideration of the merits

7.1 The Human Rights Committee has considered the present communication in the light of all the information made available to it by the parties, as provided in article 5, paragraph 1 of the Optional Protocol.

7.2 As to the claim under article 18, the Committee observes that, for numerous religions, including according to the authors, their own, it is a central tenet to spread knowledge, to propagate their beliefs to others and to provide assistance to others. These aspects are part of an individual's manifestation of religion and free expression, and are thus protected by article 18, paragraph 1, to the extent not appropriately restricted by measures consistent with paragraph 3.[5] The authors have advanced, and the State party has not refuted, that incorporation of the Order would better enable them to realize the objects of their Order, religious as well as secular, including for example the construction of places of worship. Indeed, this was the purpose of the Bill and is reflected in its objects clause. It follows that the Supreme Court's determination of the Bill's unconstitutionality restricted the authors' rights to freedom of religious practice and to freedom of expression, requiring limits to be justified, under paragraph 3 of the respective articles, by law and necessary for the protection of the rights and freedoms of others or for the protection of public safety, order, health or morals. While the Court's determination was undoubtedly a restriction imposed by law, it remains to be determined whether the restriction was necessary for one of the enumerated purposes. The Committee recalls that permissible restrictions on Covenant rights, being exceptions to the exercise of the right in question, must be interpreted narrowly and with careful scrutiny of the reasons advanced by way of justification.

7.3 In the present case, the State party has not sought to justify the infringement of rights other than by reliance on the reasons set out in the decision of the Supreme Court itself. The decision considered that the Order's activities would, through the provision of material and other benefits to vulnerable people, coercively or otherwise improperly propagate religion. The decision failed to provide any evidentiary or factual foundation for this assessment, or reconcile this assessment with the analogous benefits and services provided by other religious bodies that had been incorporated. Similarly, the decision provided no justification for the conclusion that the Bill, including through the spreading knowledge of a religion, would "impair the very existence of Buddhism or the *Buddha Sasana*". The Committee notes moreover that the international case law cited by the decision does not support its conclusions. In one case, criminal proceedings brought against a private party for proselytization was found in breach of religious freedoms. In the other case, criminal proceedings were found permissible against military officers, as representatives of the State, who had proselytised certain subordinates, but not for proselytising private persons outside the military forces. In the Committee's view, the grounds advanced in the present case therefore were insufficient to demonstrate, from the perspective of the Covenant, that the restrictions in question were necessary for one or more of the enumerated purposes. It follows that there has been a breach of article 18, paragraph 1, of the Covenant.

7.4 As to the claim under article 26, the Committee refers to its long standing jurisprudence that there must be a reasonable and objective distinction to avoid a finding of discrimination, particularly on the enumerated grounds in article 26 which include religious belief. In the present case, the authors have supplied an extensive list of other religious bodies which have been provided incorporated status, with objects of the same kind as the authors' Order. The State party has provided no reasons why the authors' Order is differently situated, or otherwise why reasonable and objective grounds exist for distinguishing their claim. As the Committee has held in *Waldman v. Canada*,[6] therefore, such a differential treatment in the conferral of a benefit by the State must be provided without discrimination on the basis of religious belief. The failure to do so in the present case thus amounts to a violation of the right in article 26 to be free from discrimination on the basis of religious belief.

7.5 As to the remaining claim that the Supreme Court determined the application adversely to the authors' Order without either notification of the proceeding or offering an opportunity to be heard, the Committee refers to its considerations in the context of admissibility set out in paragraph 6.2. As the Committee observed in *Kavanagh v. Ireland*,[7] the notion of equality before the law requires similarly situated individuals to be afforded the same process before the courts, unless objective and reasonable grounds are supplied to justify the differentiation. In the present case, the State party has not advanced justification for why, in other cases, proceedings were notified to affected parties, whilst in this case they were not. It follows that the Committee finds a violation of the first sentence of article 26, which guarantees equality before the law.

7.6 In the Committee's view, the claims under articles 19 and 27 do not add to the issues addressed above and do need to be separately considered.

8. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts as found by the Committee reveal violations by Sri Lanka of articles 18, paragraph 1, and 26 of the Covenant.

9. In accordance with article 2, paragraph 3 (a), of the Covenant, the State party is under an obligation to provide the authors with an effective remedy giving full recognition to their rights under the Covenant. The State party is also under an obligation to prevent similar violations in the future.

10. Bearing in mind that, by becoming a party to the Optional Protocol, the State party has recognized the competence of the Committee to determine whether there has been a violation of the Covenant or not and that, pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the Covenant, and to provide an effective and enforceable remedy in case a violation has been established, the Committee expects to receive from the State party, within 90 days, information about the measures taken to give effect to the Committee's Views. The State party is also requested to publish the Committee's Views.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently to be issued in Arabic, Chinese and Russian as part of the Committee's annual report to the General Assembly.]

Notes

[1] The contested clauses of the Bill were clauses 3 and 5, read with the preamble. These provided:

> Preamble.
>
> "WHEREAS the Teaching Sisters of [the Order] have established themselves as a Congregation for the propagation of Religion by establishing and maintaining catholic schools and other schools assisted or maintained by the State and engaged in educational and vocational training in several parts of Sri Lanka and in establishing and maintaining orphanages and homes for children and for the aged:
>
> AND WHEREAS it has become necessary for the aforesaid purposes to be more effectively prosecuted, pursued and attained to have the incorporation of the [the Order]:
>
> AND WHEREAS it has become expedient to have [the Order] duly incorporated"
>
> Clause 3.
>
> (a) The general objects for which the Corporation is constituted are hereby declared to be:
>
> (b) To spread knowledge of the Catholic religion;
>
> (c) To impart religious, educational and vocational training to youth;
>
> (d) To teach in Pre-Schools, Schools, Colleges and Educational Institutions;
>
> (e) To serve in Nursing Homes, Medical Clinics, Hospitals, Refugee Camps and like institutions;
>
> (f) To establish and maintain Creches, Day Care Centres, Homes for the elders, Orphanages, Nursing Homes and Mobile Clinics for the infants, aged, orphans, destitutes and sick;
>
> (g) To bring about society based on love and respect for one and all; and
>
> (h) To undertake and carry out all such works and services that will promote the aforesaid objects of the Corporation.
>
> Clause 5 gave the authority to the corporation to receive, hold and dispose of movable and immoveable property for the purposes set out in the Bill.

[2] *Kokkinakis v. Greece* Appln. 14307/88, judgement of 19 April 1993, and *Larissis v. Greece* Applns. 23372/94, 26377/94 and 26378/94, judgement of 24 February 1998.

[3] Case No. 694/1996, Views adopted on 3 November 1999.

[4] The authors cite the example of a Bill entitled "Nineteenth amendment to the Constitution" presented by a private member inter alia to make Buddhism the State's official religion as an example.

[5] See *Malakhovsky et al. v. Belarus*, case No. 1207/2003, Views adopted on 26 July 2005, and article 6 of the Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief, General Assembly resolution 36/55 of 25 November 1981, which provides: " … the right to freedom of thought, conscience, religion or belief shall include, inter alia, the following freedoms: ... (b) The right to establish and maintain appropriate charitable or humanitarian institutions".

[6] Op. cit.

[7] Case No. 819/1998, Views adopted on 4 April 2001.

QQ. Communication No. 1250/2004, *Lalith Rajapakse v. Sri Lanka* (Views adopted on 14 July 2006, eighty-seventh session)*

Submitted by:	Sundara Arachchige Lalith Rajapakse (represented by counsel, the Asian Human Rights Commission and the World Organisation against Torture)
Alleged victim:	The author
State party:	Sri Lanka
Date of communication:	28 January 2003 (initial submission)
Subject matter:	Unlawful arrest; ill-treatment and torture in detention; threats from public authorities; failure to investigate
Procedural issues:	None
Substantive issues:	Unlawful and arbitrary detention; torture in custody; liberty and security of the person
Articles of the Covenant:	7, 9 and 2, paragraph 3
Article of the Optional Protocol:	5, paragraph 2 (b)

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 14 July 2006,

Having concluded its consideration of communication No. 1250/2004, submitted to the Human Rights Committee on behalf of Sundara Arachchige Lalith Rajapakse under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the authors of the communication and the State party,

Adopts the following:

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* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Nisuke Ando, Mr. Prafullachandra Natwarlal Bhagwati, Mr. Alfredo Castillero Hoyos, Ms. Christine Chanet, Mr. Maurice Glèlè Ahanhanzo, Mr. Walter Kälin, Mr. Ahmed Tawfik Khalil, Mr. Rajsoomer Lallah, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Ivan Shearer and Mr. Hipólito Solari-Yrigoyen.

Views under article 5, paragraph 4, of the Optional Protocol

1. The author is Mr. Sundara Arachchige Lalith Rajapakse, a Sri Lankan citizen, who was 19 years old at the time of his arrest on 18 April 2002.[1] He claims to be a victim of violations by Sri Lanka of articles 2, paragraph 3; article 7; and article 9 of the International Covenant on Civil and Political Rights. He is represented by counsel: the Asian Human Rights Commission and the World Organisation against Torture. The Optional Protocol entered into force for Sri Lanka on 3 January 1998.

Facts as presented by the author

2.1 On 18 April 2002, the author was arrested by several police officers at a friend's house. On arrest, he was beaten and dragged into a jeep outside the house. He was subsequently taken to Kandana Police station, where he was detained. He was charged with two counts of robbery. During his detention, he was subjected to torture for the purposes of obtaining a confession, which caused serious injuries and may be described as follows; he was forced to lie on a bench and beaten with a pole; held under water for prolonged periods; beaten on the soles of his feet with blunt instruments; and had books placed on his head which were then hit with blunt instruments.

2.2 On 20 April 2002, the author's grandfather found him lying unconscious on the floor of a police cell. He sought the help of a member of parliament, who made inquiries. When he returned to the police station, he was informed that the author had been taken to Ragama Hospital. A few hours after the author was hospitalized, one of the police officers, allegedly involved in the attack, obtained an order to remand him in custody. Subsequently, the author's mother and grandfather learned upon returning to Ragama Hospital, that the author had been transferred to Colombo National hospital. Following his transfer, he remained unconscious for 15 days and did not speak with clarity until after 13 May 2002. On 15 May 2002, he was transferred to a remand hospital at Weilikade.

2.3 On 16 May 2002, the United Nations Special Rapporteur on Torture and other cruel, inhuman or degrading treatment or punishment sent an urgent appeal to the State party, on behalf of the author. The same day, an application for the author's release was made to the Wattala Magistrates Court. On 17 May 2002, the author was produced before a magistrate, along with a medical report issued by the National Hospital. The medical report, undated, states that the "most likely diagnosis alleged to assault due to traumatic encephalitis". He was granted bail and subsequently taken back to the National Hospital by his mother and grandfather. He remained there for treatment until June 2002.

2.4 On 20 May 2002, the author filed a petition for violation of his fundamental rights in the Supreme Court of Sri Lanka. On 13 June 2002, the Supreme Court of Sri Lanka granted leave to proceed in the fundamental rights application; a hearing was scheduled for 23 October 2003. Since then, the hearing has been postponed twice and was expected to take place on 26 April 2004 (updates provided below).

2.5 The author was subjected to constant pressure to withdraw his complaint and has been living under extreme psychological stress, which has prevented him from working and supporting his family, whose members are now obliged to live on charity. His family fears for his life. He has been repeatedly called to testify alone at a police station, even though he has already made a statement. Threats were also made against his grandfather, to force him to withdraw the complaint he had made to the Human Rights Commission of Sri Lanka. Both the author and his family have made several complaints about the threats against him and his grandfather to the National Human Rights Commission Hotline, and to the National Human Rights Commission. The author does not mention the outcome of these complaints.[2]

2.6 On 24 July 2002, the Attorney-General initiated an investigation into the torture allegedly suffered by the author, on the basis of which he filed a criminal action under the Torture Act against certain police officers in the Negambo Magistrates Court. This case remains pending, and the alleged perpetrators have neither been taken into custody nor suspended from their duties. A statement made by a judicial medical officer, on the basis of a report, dated 12 June 2002, which was recorded on 11 October 2002, confirmed that the author had been unconscious, described his injuries[3] and stated that "cerebral contusion following assault is the most likely diagnosis, but it is difficult to differentiate from Encephalitis. Most likely diagnosis alleged to assault due to traumatic encephalitis". This last injury is one which is described as an injury that "endangers life".

2.7 On 29 September 2003, the author was acquitted of two charges of robbery, as it transpired that the alleged victims had not made a complaint against him.

The complaint

3.1 The author claims that the treatment deliberately inflicted upon him, with the intent of obtaining a confession, amounted to torture, prohibited under article 7 of the Covenant.

3.2 He claims that his arrest was not made in accordance with the procedures established under Sri Lankan law, as no reason was given for his arrest, no complaint had been filed against him, no statement was taken and his detention exceeded the legal limit of 24 hours. All the above is also said to violate article 9.

3.3 The author claims that the State party's failure to take adequate action to ensure that he was protected from threats issued by police officers violates article 9, paragraph 1, of the Covenant.[4]

3.4 He claims that as the State party failed to ensure that the competent authorities investigate his allegations of torture promptly and impartially, it violated his right to an effective remedy under article 2, paragraph 3, of the Covenant.

3.5 On exhaustion of domestic remedies, the author notes that he sought to obtain redress both through criminal procedures, and through a fundamental rights petition in order to obtain compensation. As a result of which he and his family have been threatened and intimidated. An assessment of the effectiveness and the reasonableness of the length of the proceedings should take into account the circumstances of his case and the general effectiveness of the proposed remedy in Sri Lanka. In this context, he notes that: no criminal investigation was initiated for over three months after the torture, despite the severity of his injuries, and the necessity to hospitalize him for over one month; the alleged perpetrators were neither suspended from their duties nor taken into custody, enabling them to place pressure on and threaten the author; and the investigations are currently at a standstill. Moreover, considering that the criminal procedures for dealing with torture allegations in Sri Lanka have generally been demonstrated to be ineffective, and that the authorities have shown a lack of diligence in the present case, the pending criminal or civil procedures cannot be considered to constitute an effective remedy for the alleged violations.

The State party's submission on admissibility

4.1 On 15 April 2004, the State party provided its submission on admissibility. It stated that the Criminal Investigation Department (CID) of the Police commenced their investigation on 24 July 2002, upon a direction of the Attorney-General. Having concluded its investigations, the CID forwarded its report to the Attorney-General who advised it to record further witness statements and to organize an identification parade. Subsequently, the Attorney-General indicted the Sub-Inspector of Police under the Convention against Torture Act on 14 July 2004. If convicted, this police officer will be sentenced to a mandatory jail term of not less than seven years and a fine. The State party submitted that the Attorney-General would take steps to direct counsel for the State, conducting the prosecution, to inform the trial judge of the need to expedite the proceedings in this case.

4.2 The State party confirmed that the fundamental rights application, in which the author seeks damages, against officers of the Kandana Police, for his alleged illegal arrest, detention and torture, remains pending. It submitted that the author has not claimed undue delay in the matter and made no attempt to request the Supreme Court to expedite the hearing of this case. Where similar requests were made to the Supreme Court on legitimate grounds, the Supreme Court acceded to such requests by giving priority to such cases. In sum, the State party submitted that the entire communication is inadmissible for failure to exhaust domestic remedies.

4.3 On the basis of the State party's submission and on behalf of the Committee, on 25 April 2004, the Special Rapporteur on new communications considered that the admissibility of the communication should be considered separately from the merits.

The author's comments on the State party's submission

5.1 On 5 July 2004, the author commented on the State party's submission. He reiterated his initial argument on admissibility, and informed the Committee that there had been no developments in the criminal proceedings since the communication was registered. Despite the State party's submission that it would ensure an expeditious hearing of the criminal case, it did not indicate a date for the hearing, nor did it explain why the matter has been delayed for two years: this constitutes, in his view, an unreasonable delay. He added that this case would probably not be heard for some time, that there had been only one conviction in a case of torture in Sri Lanka and that that case was not heard until eight years after the torture took place.

5.2 As to the fundamental rights case pending before the Supreme Court, he observed that this case was adjourned for the third time on 26 April 2004 and was rescheduled for hearing on 12 July 2004. This delay is said to be unreasonable and in contravention of Sri Lankan law, under which the Supreme Court should hear and dispose of any fundamental rights applications within two months of filing. As to the State party's remark that the author may request the Supreme Court to expedite his case, the author was unaware of any such special procedure for making applications and claimed that the hearing of cases is a matter entirely at the discretion of the courts. The author noted that the State party makes no comment on the efficiency of criminal procedures in Sri Lanka in cases of torture generally. He explained that due to his extreme poverty an indefinite delay before he receives compensation would have serious consequences both for him and his family, as he is unable to afford proper medical and psychological treatment.

5.3 The author submitted that the procedure in itself is deficient, as is demonstrated by the fact that only one person has been charged in the criminal case although several were involved in the allegations. The State party's argument that the author only identified one individual in the identification parade is hardly satisfactory, since the author was in a coma for over two weeks following the alleged torture, and obviously under those circumstances his capacity for identification was limited. In addition, other evidence existed upon which other officers could have been charged, including documentary evidence submitted by the police officers themselves to the Magistrates Court and Supreme Court. In his view, sole reliance on the author's identification, particularly in the circumstances of this case, has resulted in the complete exoneration of the other perpetrators. The author also argued that the only charge filed against the police officer in the criminal proceedings is that of torture; no charges have been filed regarding the illegal arrest and/or detention.

5.4 The author observed that the State party offered no information on what measures have been adopted to put a stop to the threats and other measures of intimidation to which he has been subjected and adds that there is no witness protection programme in Sri Lanka.

5.5 On 10 December 2004, the author provided an update on the proceedings to date. He submitted that his hearing before the Supreme Court was again postponed and given a new hearing date of 11 March 2005. This is the fourth time the case had been rescheduled. According to the author, whether the case would be heard on that day would depend on how busy the Court is, and the case may very well be postponed again. The hearing in the High Court was scheduled to take place on 2 February 2005 which, according to the author, could take several years to determine. He stated that these prolonged delays have exacerbated his exposure to threats and serious risk of harm at the hands of those that do not wish him to pursue judicial remedies. He referred to the recent murder of a torture victim, Mr. Gerald Perera, in mysterious circumstances just a few days before a hearing in the High Court of Negombo, where he was to provide testimonial evidence against seven police officers accused of having tortured him, and fears the same fate. According to the author, Mr. Perera was assassinated on 24 November 2005, and during the criminal inquiry into the case, several police officers admitted that his murder was motivated by fears that they may go to jail if he had given evidence against them in the Negombo High Court. Threats to the author had continued and he had been forced into hiding to protect himself against harm.

5.6 On 10 March 2005, the author explained that the hearing in the criminal case, which was due to take place on 2 February 2005, was postponed again until 26 May 2005. Local counsel assisting the author filed a motion with the court on 2 February 2005 to expedite the case. The motion was denied on the grounds that a new judge had been assigned to the case and that it would be up to this judge to schedule the case according to his priorities. On 14 March 2005, the author stated that the 11 March 2005 hearing before the Supreme Court was not heard on the merits but postponed until 26 June 2005.

The Committee's admissibility decision

6.1 During its eighty-third session, on 8 March 2005, the Committee examined the admissibility of the communication. It noted that the issues raised by the author were still pending before the High Court as well as the Supreme Court, despite nearly three years having passed since their institution, and the police officer alleged to have participated in the torture of the author still continues under indictment in the criminal case. It considered it significant that the State party had not provided any reasons why either the fundamental rights case or the indictment against the police officer could not have been considered more expeditiously, nor had it claimed the existence of any elements of the case which should have complicated the investigations and judicial determination of the case preventing its determination for nearly three years.

6.2 The Committee found that the delay in the disposal of the Supreme Court case and the criminal case amounted to an unreasonably prolonged delay within the meaning of article 5, paragraph 2 (b), of the Optional Protocol. On 8 March 2005, the Committee declared this communication admissible.

The State party's submission on the merits

7.1 On 27 September 2005, the State party provided its submission on the merits. It largely reiterates its arguments that the case is inadmissible for lack of exhaustion of domestic remedies and that it is currently in the process of providing the author with an effective remedy. On the facts, it informs the Committee of the Attorney-General's role as a party in all fundamental rights applications, during which he/she is represented by counsel. He/she does not appear for any respondents in fundamental rights applications, where allegations of torture are made, even though in all other matters he/she defends public officers in actions filed against them.

7.2 The State party informs the Committee that, as the outcome of the author's fundamental rights application to the Supreme Court would affect the determination of the High Court matter, the case to the Supreme Court was adjourned until completion of the proceedings before the High Court. The Supreme Court made an order that the author should file a motion in the Supreme Court when the High Court trial has concluded. The Supreme Court requested the High Court to expedite the police officer's trial.

7.3 On the sequence of High Court hearings, the State party submits that the police officer in question was indicted on 14 July 2004 and the case was fixed for trial on 13 October 2004. As the prosecution witnesses, including the author, were not present, the case was adjourned. The summonses were re-issued and the case fixed for hearing on 2 February 2005. Following a request by the police officer's counsel, the case was adjourned until 26 May 2005. On that date, the trial began and the author's evidence-in-chief was led. However, his evidence could not be concluded on that date as the author informed the Court that he was ill. The case was fixed for 12 July 2005, on which date the author's evidence-in-chief was concluded. The trial for cross-examination was fixed for 28 November 2005. The State party submits that the prosecution had not moved for any postponement of the case other than on 13 October 2004, when the author and the other prosecution witnesses did not attend. Counsel for the prosecution requested the trial judge to expedite the case and informed him of the communication to this Committee.

7.4 The State party urges the Committee to refrain from making any determination on the merits of this case until the conclusion of the High Court trial, as its Views could prejudice either the prosecution or the defence. If the police officer is convicted, the fundamental rights application would be taken up by the Supreme Court and a determination with regard to compensation for the author could be made.[5] The Supreme Court could direct that compensation be paid by the State party and/or the police officer convicted.

7.5 The State party provides general information on the High Courts in Colombo, including their heavy workload, and argues that to give preference in one case would be at the expense of others. The High Court exercises original jurisdiction in criminal trials and exercises provincial appellate jurisdiction. In the Negombo High Court, at the time of writing the submission, there were 365 cases on the trial roll and a further 167 cases to be fixed for trial. There have been two cases of conviction for torture by the High Court and an equal number of acquittals. As to the Supreme Court, there are nearly a thousand applications filed before it every year. Thus, although the Constitution provides for the disposal of applications within a period of two months, it is impossible to do so. The State party provides further information of a general nature on administrative remedies within Sri Lanka, including making applications to the Human Rights Commission and National Police Commission, which it considers are independent bodies.

7.6 On the complaints of violations of articles 2, 7 and 9, the State party submits that the author has invoked the jurisdiction of the Supreme Court, which was adjourned to prevent prejudice to the prosecution in the criminal trial. Thus, an effective remedy was provided, and a diligent investigation is currently being pursued. It also submits that "the police have at the request of the author given him special police protection on the basis of his complaint that he is under threat."

The author's comments on the State party's submission

8.1 On 27 September 2005, the author provided the following comments on the State party's submission. He submits that the State party's repeated contention that the complaint is inadmissible, due to non-exhaustion of domestic remedies, is unjustified in light of the Committee's decision on admissibility, as well as the lapse of an additional year, since its consideration, in which no progress has been made in the domestic proceedings. The State party does not provide an adequate explanation for the failure of the Courts to address these serious issues within a reasonable time; nor does it provide any timeframe for consideration. On the contrary, based on the current domestic law and practice, there is little prospect of a final judicial decision in the near future. The decision to postpone the hearing of the Supreme Court was taken on the basis of a submission made by the police officer's counsel. Assuming the police officer is convicted, he will have the right to appeal to the Court of Appeal, which will take several years, and subsequently, as a matter of law, to the Supreme Court, which can also cause additional delays. As the hearing of the fundamental rights case has been adjourned until the end of the High Court trial, there is no reason why it will not be adjourned until the entire process is over.

8.2 The author submits that, as the State party does not deny the facts of the case as submitted by him, but relies merely on the fact that the matter is being dealt with by the domestic courts, the Committee should give due weight to his account of the facts. In addition, he refers to the jurisprudence of the Committee that, when substantiated allegations made by authors of a communication go unrefuted, they must be considered to be established. The author reiterates its arguments on the merits, in particular with respect to his claim under article 2, paragraph 3. He refers to the lack of progress in the proceedings,[6] in which the total time of the recording of evidence, since the filing of the indictment in July 2004 to date, is less than two hours of actual court time. There are ten witnesses in this case and the taking of evidence from the first witness (the author) is still not yet completed. Thus, recording the evidence of the other witnesses may take many more years.

8.3 According to the author, neither he nor any of his witnesses absented themselves from court since the summonses were served. He takes no responsibility for any of the postponements, and submits that it is not within his power to make any application to expedite his case. He has written to the Attorney-General, who is in such a position, as well as to human rights organizations, but no measures have been taken to respond to his requests. The Attorney-General is party to the proceedings of both the High Court and the Supreme Court and, is the only party who can apply for the case to be expedited. He submits that the issue of important generalized delays was raised by the Committee against Torture in its Concluding Observations on Sri Lanka in November 2005, which recommended to the State party to ensure speedy trials, especially for victims of torture.

8.4 In the author's view, the unreasonably prolonged domestic delays are reducing the chances of a fair outcome. Important evidence could be lost while waiting for trial. In particular, one of his key witnesses, his grandfather, is now 75 years of age and the author fears that he may pass away or have memory loss due to age before the end of the proceedings. The author refers to a report of the Special Rapporteur on Torture[7] to demonstrate that it is quite common in the State party for the accused to be acquitted due to the absence of witnesses.

8.5 While awaiting the hearing, the author submits that he has had to leave his home and his job out of fear of reprisals by police officers and subsists thanks to the charity of a human rights organization. He states that both the Committee against Torture and the Special Rapporteur on Torture have perceived the extremely precarious situation of victims of torture who decide to seek justice before Sri Lankan courts. They have called on the State party to provide witness protection to victims of torture, since there is no witness protection programme in the State party.

Issues and proceedings before the Committee

9.1 The Human Rights Committee has examined the present communication in the light of all the information made available to it by the parties, as provided for under article 5, paragraph 1, of the Optional Protocol.

9.2 The Committee takes due note of the State party's argument reiterating its view that domestic remedies have not been exhausted. The Committee reiterates its finding that the delay in the disposal of the Supreme Court case and the criminal case amounts to an unreasonably prolonged delay within the meaning of article 5, paragraph 2 (b), of the Optional Protocol. This view is only strengthened by the fact that both cases, nearly one and a half years after the admissibility decision, continue to be pending.

9.3 With regard to the merits of the communication, the Committee notes that criminal proceedings, against one of the alleged perpetrators, have been pending in the High Court since 2004, and that the author's fundamental rights application before the Supreme Court has been adjourned, pending determination of the High Court proceedings. The Committee reiterates its jurisprudence that the Covenant does not provide a right for individuals to require that the State party criminally prosecute another person.[8] It considers, nevertheless, that the State party is under a duty to investigate thoroughly alleged violations of human rights, and to prosecute and punish those held responsible for such violations.

9.4 The Committee observes that, as the delay in the author's fundamental rights application to the Supreme Court is dependant upon the determination of the High Court case, the delay in determining the latter is relevant for its assessment of whether the author's rights under the Covenant were violated. It notes the State party's argument that the author is currently availing himself of domestic remedies. The Committee observes that the criminal investigation was not initiated by the Attorney-General until over three months after the incident, despite the fact that the author had to be hospitalized, was unconscious for 15 days, and had a medical report describing his injuries, which was presented to the Magistrates Court on 17 May 2002. While noting that both parties accuse each other of responsibility for certain delays in the hearing of this case, it would appear that inadequate time has been assigned for its hearing, viewed in light of the numerous court appearances held over a period of two years, since the indictments were served (four years since the alleged incident), and the lack of significant progress (receipt of evidence from one out of 10 witnesses). The State party's argument on the High Court's large workload does not excuse it from complying with its obligations under the Covenant. The delay is further compounded by the State party's failure to provide any timeframe for the consideration of the case, despite its claim that, following directions from the Attorney-General, Counsel for the prosecution requested the trial judge to expedite the case.

9.5 Under article 2, paragraph 3, the State party has an obligation to ensure that remedies are effective. Expedition and effectiveness are particularly important in the adjudication of cases involving torture. The general information provided by the State party on the workload of the domestic courts would appear to indicate that the High Court proceedings and, thus, the author's Supreme Court fundamental rights case will not be determined for some time. The Committee considers that the State party may not avoid its responsibilities under the Covenant with the argument that the domestic courts are dealing with the matter, when it is clear that the remedies relied upon by the State party have been prolonged and would appear to be ineffective. For these reasons, the Committee finds that the State party has violated article 2, paragraph 3, in connection with 7 of the Covenant. Having found a violation of article 2, paragraph 3, in connection with article 7, and in light of the fact that the consideration of this case, as it relates to the claim of torture, remains pending before the High Court, the Committee does not consider it necessary, in this particular case, to determine the issue of a possible violation of article 7 alone of the Covenant.

9.6 As to the claim of violations of article 9, as they relate to the circumstances of his arrest, the Committee notes that the State party has not contested that the author was arrested unlawfully, was not informed of the reasons for his arrest or of any charges against him and was not brought promptly before a judge, but merely argues that these claims were made by the author in his fundamental rights application to the Supreme Court which remains pending. For these reasons, the Committee finds that the State party has violated article 9, paragraphs 1, 2 and 3, alone and together with article 2, paragraph 3.

9.7 The Committee notes that the State party contests the claim under article 9, paragraph 1, that it failed to take adequate action to ensure that the author was and continues to be protected from threats issued by police officers, since he filed his petition in his fundamental rights case.

The Committee also observes that the author denies that there is any witness protection programme within the State party and that he has had to go into hiding out of fear of reprisals. The Committee recalls its jurisprudence that article 9, paragraph 1 of the Covenant protects the right to security of person also outside the context of formal deprivation of liberty.[9] The interpretation of article 9 does not allow a State party to ignore threats to the personal security of non-detained persons subject to its jurisdiction. In the current case, it would appear that the author has been repeatedly requested to testify alone at a police station and has been harassed and pressurised to withdraw his complaint to such an extent that he has gone into hiding. The State party has merely argued that the author is receiving police protection but has not indicated whether there is any investigation underway with respect to the complaints of harassment nor has it described in any detail how it protected and continues to protect the author from such threats. In addition, the Committee notes that the alleged perpetrator is not in custody. In the circumstances, the Committee concludes that the author's right to security of person, under article 9, paragraph 1 of the Covenant has been violated.

10. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol, is of the view that the facts before it disclose violations of article 2, paragraph 3 in connection with article 7; article 9, paragraphs 1, 2 and 3, as they relate to the circumstances of his arrest, alone and together with article 2, paragraph 3; and article 9, paragraph 1, as it relates to his right to security of person, of the Covenant.

11. The Committee is of the view that the author is entitled, under article 2, paragraph 3 (a), of the Covenant, to an effective remedy. The State party is under an obligation to take effective measures to ensure that: (a) the High Court and Supreme Court proceedings are expeditiously completed; (b) the author is protected from threats and/or intimidation with respect to the proceedings; and (c) the author is granted effective reparation. The State party is under an obligation to ensure that similar violations do not occur in the future.

12. Bearing in mind that, by becoming a State party to the Optional Protocol, the State party has recognized the competence of the Committee to determine whether there has been a violation of the Covenant or not and that, pursuant to article 2 of the Covenant the State party has undertaken to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the Covenant and to provide an effective and enforceable remedy in case a violation has been established, the Committee wishes to receive from the State party, within 90 days, information about the measures taken to give effect to the Committee's Views.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the Committee's annual report to the General Assembly.]

Notes

[1] The exact date of his birth is not provided.

[2] He provides press reports on the threats received.

[3] "Healing scab abrasion 2" x 3" on the right scapular region; healing scab abrasion 1" x 1" on the back of the right elbow; healing scab abrasion 2" x 1,1/2" on the front of the right chest; Contusion 2" x 3" on the back of the left hand; Contusion 2" x 3" on the front of the left forearm; Contusion 1" x 1,1/2" on the medial side of the left hand; Contusion 1" x 2" on the lateral side of the left hand; contusion 2" x 2" on the sole of the left foot; Contusion 2" x 1" on the sole of the right foot."

[4] The author refers to the Committee's jurisprudence. See case No. 821/1998, *Chongwe v. Zambia*, Views adopted on 25 October 2000, case No. 195/1985, *Delgado Paez v. Colombia*, Views adopted on 12 July 1990, case No. 711/1996, *Dias v. Angola*, Views adopted on 18 April 2000.

[5] It does not appear that the consideration of the fundamental rights application in the Supreme Court is dependent upon a guilty verdict in the High Court. The Supreme Court case will be considered when the High Court case is determined and upon an application by the author.

[6] He provides the chronology before the High Court as follows:

14.07.04 - Indictments served on the accused.

29.07.04 - Case called again.

13.10.04 - Case called for trial but no evidence taken.

02.02.05 - A trial date but no evidence is heard.

26.05.05 - The evidence of the author commences: evidence taken for about 45-50 minutes.

12.07.05 - The author's examination in chief continues: evidence taken for about 25 minutes.

23.08.05 - The author's cross examination begins: evidence recorded for about 45 minutes.

28.11.05 - The case is called and postponed without recording any evidence.

04.05.06 - The next scheduled date.

[7] E/CN.4/2004/56/Add.1, 23 March 2004.

[8] Case No. 213/1986, *H.C.M.A. v. the Netherlands*, adopted 30 March 1989; case No. 275/1988, *S.E. v. Argentina*, adopted 26 March 1990; case Nos. 343-345/1988, R.*A.*, *V.N. et al. v. Argentina*, adopted 26 March 1990.

[9] Case No 821/1998, *Chongwe v. Zambia*, Views adopted on 25 October 2000, case No. 195/1985, *Delgado Paez v. Colombia*, Views adopted on 12 July 1990, case No. 711/1996, *Dias v. Angola*, Views adopted on 18 April 2000, case No. 916/2000, *Jayawardena v. Sri Lanka*, Views adopted on 22 July 2002.

RR. Communication No. 1297/2004, *Medjnoune v. Algeria* (Views adopted on 14 July 2006, eighty-seventh session)*

Submitted by:	Ali Medjnoune (represented by counsel, Rachid Mesli)
Alleged victim:	Malik Medjnoune (the author's son)
State party:	Algeria
Date of communication:	11 June 2004 (initial submission)
Subject matter:	Apprehension and continued captivity, incommunicado detention, detention without trial
Procedural issues:	None
Substantive issues:	Prohibition of torture and cruel, inhuman and degrading treatment; right to liberty and security of the person; arbitrary arrest and detention; respect for the inherent dignity of the human person; right to a fair trial; right to be promptly informed of the charges; right to be tried within a reasonable time
Articles of the Covenant:	Articles 7; 9, paragraphs 1, 2 and 3; 10, paragraph 1; 14, paragraphs 3 (a), (c) and (e)
Articles of the Optional Protocol:	

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 14 July 2006,

Having concluded its consideration of communication No. 1297/2004, submitted to the Human Rights Committee on behalf of Mr. Malik Medjnoune under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the author of the communication, and the State party,

Adopts the following:

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* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Nisuke Ando, Mr. Prafullachandra Natwarlal Bhagwati, Mr. Alfredo Castillero Hoyos, Ms. Christine Chanet, Mr. Maurice Glèlè Ahanhanzo, Mr. Walter Kälin, Mr. Ahmed Tawfik Khalil, Mr. Rajsoomer Lallah, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Ivan Shearer, Mr. Hipólito Solari-Yrigoyen and Mr. Roman Wieruszewski.

Views under article 5, paragraph 4, of the Optional Protocol

1. The author of the communication, dated 11 June 2004, is Mr. Ali Medjnoune, who submits the communication on behalf of his son Malik Medjnoune, born on 15 February 1974, who is an Algerian national currently detained in the civil prison at Tizi-Ouzou, Algeria. The author states that his son is a victim of violations by Algeria of articles 7; 9, paragraphs 1, 2 and 3; 10, paragraph 1; and 14, paragraphs 3 (a), (c) and (e), of the International Covenant on Civil and Political Rights. He is represented by counsel, Rachid Mesli. The Covenant and its Optional Protocol entered into force for the State party on 12 December 1989.

Facts as presented by the author

2.1 The author states that his son was abducted at 8.30 a.m. on 28 September 1999, on the public highway some 200 metres from his home, by three armed individuals in plain clothes (members of the Intelligence and Security Department (DRS)) in a white Renault car.[1] They threatened him with their guns, fired a shot and forced him into the car in front of witnesses. He was first taken to a military barracks in the centre of Tizi-Ouzou, where he was beaten, and was then put in the boot of a car and taken to another barracks some 100 kilometres away, the "Antar" Centre in Ben-Aknoun (Algiers), a DRS facility. He was handed over to a Captain Z. and a colleague and tortured for two days by the Algerian security services: he was beaten all over his body with a pickaxe handle; subjected to the *chiffon* torture, whereby a rag is stuffed into the victim's mouth and their stomach filled with dirty water to cause a sensation of suffocation and drowning; tortured with electric shocks all over his body; etc.[2] He was also questioned about his time in prison (three years between 1993 and 1996) and the people he met there, and about whether he had kept in touch with them (particularly a person who had fled abroad), and whether he himself intended to go abroad.

2.2 The author states that he lodged a complaint concerning his son's disappearance with the prosecutor in Tizi-Ouzou on 2 October 1999. The complaint was registered as case No. 99/PG/3906. The prosecutor met the author on 15 October and 8 November 1999 and told him that he knew nothing of the abduction. Yet he did not order an investigation as required by law for an offence of that gravity. The son states that he was brought before the prosecutor on 4 March 2000, at the same time as another person (C.H.).[3] He appeared before the same prosecutor a second time on 6 March 2000, again with that person, after which he was taken back to the DRS facility at Ben-Aknoun, where he was held for nearly two months by order of the prosecutor who had received the complaint of disappearance on 2 October 1999. Under Algerian law this constitutes an offence, and complicity in an offence, of abduction and false arrest under the Criminal Code, articles 292, 293 and 293 bis.[4] Throughout this period, the son was held incommunicado in particularly inhumane conditions, for a full 218 days up to 2 May 2000, when he appeared before the examining magistrate of the Tizi-Ouzou court. The author points out that the legal duration of police custody under Algeria's Code of Criminal Procedure is a maximum of 12 days.[5] The author states that, on 2 May 2000, the examining magistrate charged his son with being an accessory to the murder of the Kabyle singer Matoub Lounès and with membership of an armed group, and that his son was placed in pretrial detention.

2.3 As regards domestic remedies, the author points out that he lodged a complaint in respect of his son's incommunicado detention, but that the prosecuting service, the only body with the power to take action, failed to do so. As to his son's detention without trial since 2 May 2000 in the civil prison at Tizi-Ouzou. Algerian law provides that detention without trial may not exceed 16 months (four periods of four months each).[6] After two extensions, this four-month period may, exceptionally, be extended by the indictments division for a further, non-renewable, four-month period.[7] At the end of that time, the accused must be brought before the trial court at its next sitting.[8] In the matter in question, since the investigation was completed in April 2001, the case should have been referred to the June 2001 sitting but was not. The author's son therefore wrote to the indictments division asking for provisional release under article 128 of the Code of Criminal Procedure,[9] but his application was rejected by the indictments division of the Tizi-Ouzou court on 6 August 2001.[10] The son applied several more times, to no avail, the last application having been denied on 28 December 2003.[11] All domestic remedies have thus been exhausted.

2.4 The author states that the case was submitted to Amnesty International on 9 December 1999 and to the United Nations Working Group on Enforced or Involuntary Disappearances in April 2000.

The complaint

3.1 The author claims that Malik Medjnoune is the victim of a violation of articles 7; 9, paragraphs 1, 2 and 3; 10, paragraph 1; and 14, paragraphs 3 (a), (c) and (e), of the International Covenant on Civil and Political Rights. His most basic rights have been violated, and in particular his right to liberty, to be informed at the time of arrest, to be brought promptly before a judge or other officer authorized by law to exercise judicial power, to challenge the legality of his detention, to be tried within a reasonable time and, lastly, to be treated with humanity while in detention and not subjected to torture.

3.2 With regard to the allegations under article 7, counsel states that there can be no question that Mr. Medjnoune was abducted by the Algerian security services on 28 September 1999, held incommunicado and tortured. He states that incommunicado detention in an unrecognized place of detention, without the slightest contact with the outside world and for a prolonged period, is considered to be an act of torture in itself, and that the cruel and inhuman treatment to which the son was subjected constitutes a violation of articles 7 and 10 of the Covenant.

3.3 Under article 9, counsel points out that the abduction of Malik Medjnoune and his detention for nearly eight months are not in accordance with domestic regulations, either as to substance or as to procedure, and constitute a violation of article 9, paragraph 1. Moreover, in violation of article 9, paragraph 2, the son was not informed of the facts or reasons behind his abduction or of the charges against him until he was brought before the examining magistrate eight months later. As to the alleged violation of article 9, paragraph 3, the son was not brought promptly before a judge[12] and was detained arbitrarily. The prosecutor refused to bring Mr. Medjnoune before an examining magistrate, instead sending him back to the security services. Furthermore, the son's continuing detention more than four years after his appearance before the examining magistrate on 2 May 2000 constitutes a violation of article 9, paragraph 3, of the Covenant. Lastly, counsel points out that Mr. Medjnoune was held incommunicado in utterly inhuman conditions for nearly eight months, during which time he suffered torture and brutality of the worst kind.

State party's submission on the admissibility and merits of the communication

4.1 By note verbale of 28 December 2004, the State party explains that, in the case of the murder of Matoub Lounès, a judicial investigation against a person or persons unknown on 30 June 1998 was opened by the examining magistrate in Tizi-Ouzou. After inquiries lasting several months, and partly on the basis of information provided by a former terrorist turned State's evidence, a number of people were arrested and brought before the courts, including Malik Medjnoune, who was charged with murder and membership of a terrorist organization. On completion of the judicial investigation, the examining magistrate, on 2 December 2000, ordered the file to be sent to the public prosecutor, who requested the referral of Malik Medjnoune and the co-perpetrators to the indictments division of the Tizi-Ouzou court. On 10 December 2000, the indictments division issued an order committing the accused for trial in the criminal court of Tizi-Ouzou on charges of membership of a terrorist organization and murder, which constitute offences under the Criminal Code, articles 87 bis and 255 ff. The accused applied to the Supreme Court for a judicial review of the order, but their application was denied on 10 April 2001. Hearings were then set for 5 May 2001 in the Tizi-Ouzou court, but adjourned because events in the region made it impossible to try the case in the conditions of calm required for proceedings of this nature. The case should very shortly be scheduled for trial in the Tizi-Ouzou criminal court, in accordance with the law.

4.2 With regard to the allegations of beatings and arbitrary detention in the course of police custody, the State party asserts that there is nothing in the complaint or in the supporting documentation to substantiate such allegations and they should therefore be rejected. As to the alleged violation of the provisions governing Malik Medjnoune's detention, articles 125 ff. of the Code of Criminal Procedure relate to provisional detention during the judicial investigation stage and not during the subsequent stage. Malik Medjnoune moved beyond that stage with the issuance of the 10 December 2000 order committing him for trial in the criminal court. The criminal court decided to adjourn the proceedings under article 278 of the Code of Criminal Procedure, which states that "the President of the Criminal Court may, either *proprio motu* or at the request of the Public Prosecutor's Office, adjourn to a later sitting any case that is not in his view ready to be tried at the sitting for which it has been scheduled". The complaint should therefore be rejected as groundless.

Author's comments on the State party's observations

5.1 On 31 January 2005, counsel for the author notes in the first place that the State party does not contest the admissibility of the communication, which should therefore be declared admissible as to the form since all domestic remedies have been exhausted and the State party has nothing to say on the matter. On the merits, counsel maintains that the State party's arguments to the effect that the arbitrary detention and beatings have not been substantiated do not warrant serious consideration, since the State party does not contest the abduction, the duration and place of incommunicado detention, the complaint lodged by the author or the communication received by the Working Group on Enforced or Involuntary Disappearances. There can thus be no reasonable doubt that Malik Medjnoune underwent torture and beatings while in incommunicado detention, this being a practice that is widespread in the State party and regularly reported by the Special Rapporteur and by human rights NGOs. Lastly, counsel argues that 218 days' incommunicado detention without the slightest contact with the outside world constitutes an act of torture in itself.

5.2 As to Malik Medjnoune's ongoing detention, counsel points out that the State party acknowledges that the investigation into the case ended on 2 December 2000 and that the trial date was set for 5 May 2001, yet claims that Mr. Medjnoune has not been in provisional detention since 10 December 2000. His continuing detention is said to be in accordance with article 278 of the Code of Criminal Procedure, a provision which, if so interpreted, would allow the Public Prosecutor's Office, where the investigation stage is complete but no trial date has yet been set, to continue to detain any person indefinitely on any grounds it pleased. Such an interpretation, counsel argues, would give rise to a clear violation of the right to liberty of the person under article 9, paragraph 1, of the Covenant. While it is also true that, under article 279 of the Code of Criminal Procedure, "any case that is ready to be tried shall be submitted to the court at its next sitting", judicial practice in Algeria is such that only the Public Prosecutor's Office has the discretion to schedule a case for a given sitting of the criminal court. In counsel's view, the State party should be required to bring its legislation into line with the Covenant, inter alia by establishing a legal maximum limit for detention between the date of committal for trial by the indictments division and the date of the trial itself. It seems clear that the delay in bringing the author's son to trial cannot be considered a reasonable time.

5.3 On 1 and 3 February 2006, counsel for the author provided a copy of the latest ruling of the Tizi-Ouzou indictments division, handed down on 19 September 2005 and again denying Malik Medjnoune provisional release after more than six years' pretrial detention. The ruling is based on the Code of Criminal Procedure, article 123.[13] According to the indictments division, detention in this instance "is still necessary and his release would jeopardize the establishment of the truth", even though the investigation ended more than five years ago with an order committing the accused for trial in the Tizi-Ouzou criminal court, issued by that selfsame division on 10 December 2000. Yet the indictments division is reluctant to ask the prosecutor's office to set a trial date. Lastly, counsel states that the Algerian authorities are trying to intimidate the author's son into withdrawing his communication, and that he is under pressure to do so to have any hope of a trial.

State party's reply

6. By note verbale dated 23 May 2006, the State party repeats that Mr. Medjnoune's detention is not arbitrary, since articles 125 ff. of the Code of Criminal Procedure relate to provisional detention during the judicial investigation stage and not during the subsequent stage. Mr. Medjnoune's case has reached the criminal court, which has adjourned proceedings under article 278 of the Code of Criminal Procedure. The State party explains that, while awaiting trial, the accused may at any time submit a request for provisional release to the indictments division, which Mr. Medjnoune has done. With regard to the latest denial of application, the appropriateness of that decision is not open to discussion, since the court is sovereign in its evaluation of the facts of the case and the desirability or otherwise of granting a request submitted to it by an accused. The State party explains that the case should very shortly be scheduled for trial in the criminal court. Furthermore, if he meets the legal requirements, Mr. Medjnoune could avail himself of order No. 06-01 of 27 February 2006, on the implementation of the Peace and National Reconciliation Charter.[14] He could then be granted either extinction of the public right of action before his case came to trial or, were he to be tried and convicted, a commutation of the sentence or a pardon. The order is in the process of being implemented. Lastly, the State party maintains that the allegation that pressure is being exerted on Mr. Medjnoune to withdraw his communication is too vague

and meaningless to be entertained. It amounts to no more than an assertion and provides no further detail as to either the precise nature of this pressure or which "Algerian authorities" are exerting it.

Issues and proceedings before the Committee

Consideration of admissibility

7.1 Before considering any claim contained in a communication, the Human Rights Committee must, in accordance with rule 93 of its rules of procedure, decide whether or not the communication is admissible under the Optional Protocol to the Covenant.

7.2 The Committee has ascertained that the same matter is not being examined under another procedure of international investigation or settlement for the purposes of article 5, paragraph 2 (a), of the Optional Protocol.

7.3 On the question of exhaustion of domestic remedies, the Committee notes that, in respect of the son's incommunicado detention with the Algerian security services from 28 September 1999 to 2 May 2000, a complaint was lodged on 2 October 1999 on which the prosecutor's office failed to act despite being the only body with the power to do so. As to the son's detention without trial since 2 May 2000, he has made several applications for provisional release, all of which have been rejected without him ever having been brought to trial. Consequently, the Committee is of the view that the application of domestic remedies has been unreasonably drawn out and that the author has therefore met the requirements of article 5, paragraph 2 (b), of the Optional Protocol.

7.4 With regard to the complaints under articles 7; 9, paragraphs 1, 2 and 3; and 10, paragraph 1, the Committee notes that the author has presented detailed allegations regarding his son's apprehension, incommunicado detention and conditions of imprisonment, and regarding the ill-treatment to which he was allegedly subjected. Rather than replying to the various allegations, the State party merely says they are not substantiated. In this case, the Committee takes the view that the facts described by the author are sufficient to substantiate the complaints under article 7, paragraphs 1, 2 and 3, article 9, paragraph 1, and article 10 for the purposes of admissibility. The Committee also finds that the complaints under article 14, paragraph 3 (a) and (c), are sufficiently substantiated. As to the complaint under article 14, paragraph 3 (e), the Committee notes that the author's son has not yet appeared before a judge to answer the charges against him. It accordingly considers that this complaint is incompatible *ratione materiae* under article 3 of the Optional Protocol. It therefore concludes that the communication is admissible under articles 7; 9, paragraphs 1-3; 10, paragraph 1; and 14, paragraph 3 (a) and (c), and proceeds to its consideration on the merits.

Consideration on the merits

8.1 The Human Rights Committee has considered the present communication in the light of all the information made available to it by the parties, as provided for in article 5, paragraph 1, of the Optional Protocol.

8.2 Concerning the complaint of incommunicado detention, the Committee notes the author's assertion that his son was arrested on 28 September 1999 and was missing until 2 May 2000. The Committee notes that the State party has not replied to the author's allegations, which are sufficiently detailed.

8.3 The Committee recalls[15] that the burden of proof cannot rest solely on the author of the communication, especially considering that the author and the State party do not always have equal access to the evidence and that frequently the State party alone has access to relevant information. It is implicit in article 4, paragraph 2, of the Optional Protocol that the State party has the duty to investigate in good faith all allegations of violations of the Covenant made against it and its representatives and to transmit to the Committee the information in its possession. In cases where the author has communicated to the State party allegations that are supported by credible testimony and where further clarification depends entirely on information the State party alone possesses, the Committee may consider the allegations substantiated if the State party fails to refute them by providing evidence and satisfactory explanations.

8.4 Concerning the complaint of violation of article 7 of the Covenant, the Committee is aware of the suffering entailed by detention without contact with the outside world for an indefinite period. In this connection, it recalls its general comment No. 20 (44) relating to article 7, in which it recommends States parties to take measures to prohibit incommunicado detention. In these circumstances, the Committee concludes that the apprehension and continued captivity of the author's son, preventing him from communicating with his family and with the outside world, constitute a violation of article 7 of the Covenant.[16] Moreover, the circumstances surrounding the apprehension and continued captivity of Malik Medjnoune and his testimony of May 2000 that he was tortured on several occasions constitute strong grounds for believing that he was subjected to such treatment. The Committee has received no information from the State party that contradicts that belief. The Committee concludes that the treatment to which Malik Medjnoune was subjected constitutes a violation of article 7.[17]

8.5 The information before the Committee shows that Malik Medjnoune was taken away by agents of the State party who were outside his house looking for him. In the absence of adequate explanations from the State party concerning the author's allegations that his son's apprehension and detention were arbitrary or illegal and that he was held incommunicado until 2 May 2000, the Committee finds a violation of article 9, paragraph 1.

8.6 With regard to the alleged violations of article 9, paragraph 2, and article 14, paragraph 3 (a), the Committee recalls that those provisions guarantee that anyone who was arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him.[18] The Committee notes that Mr. Medjnoune was arrested on 28 September 1999, a fact not disputed by the State party, and that he was held incommunicado for 218 days, a fact also not disputed by the State party. It also notes counsel's claim that Mr. Medjnoune was not promptly informed of the reasons for his arrest and that the State party has not refuted this claim. In the absence of any information from the State party showing that the author was promptly informed of the reasons for his arrest, the Committee must rely on the author's statement that his son was apprised of the reasons for his arrest only when he appeared before the examining magistrate on 2 May 2000. This delay is incompatible with article 9, paragraph 2, and article 14, paragraph 3 (a), and the Committee finds a violation of these provisions.

8.7 As to the alleged violation of article 9, paragraph 3, the Committee recalls that the right to be brought "promptly" before a judicial authority implies that any delay should be no more than a few days, and that incommunicado detention may in itself constitute a violation of article 9, paragraph 3.[19] It takes note of the testimony of the author's son that he was brought before the prosecutor on 4 and 6 March 2000, and the author's argument that his son was held incommunicado for 218 days until he was brought before the examining magistrate on 2 May 2000, and that he has been awaiting trial for more than six years. In the author's case, and in the absence of satisfactory explanations from the State party or any other justification in the file, the Committee finds that pretrial detention lasting more than five years constitutes a violation of the right under article 9, paragraph 3.

8.8 In the light of the above conclusions, the Committee is not required to consider the author's allegations under article 10 of the Covenant.

8.9 The Committee notes that Mr. Medjnoune is still in detention and is still awaiting trial. It notes that, according to the State party, the judicial investigation into the case was completed on 10 December 2000 and that the hearing was set for 5 May 2001 but subsequently adjourned. Today, nearly seven years after the start of the inquiry and more than five years after the first committal order, the author's son is still in prison and is still waiting to be tried. In respect of the excessive pretrial delay, the Committee recalls that, according to its case law, "in cases involving serious charges such as homicide or murder, and where the accused is denied bail by the court, the accused must be tried in as expeditious a manner as possible".[20] In the case at hand, given that the son was arrested on 28 September 1999 and charged on 2 May 2000 as an accessory to murder, among other things, the Committee believes compelling reasons would have been required to justify nearly six years' detention without trial or sentence. The State party has said that events in the region have made it impossible to try the case in the conditions of calm required for proceedings of this nature. It also informed the Committee on 28 December 2004 that the case should be scheduled for trial in the Tizi-Ouzou criminal court in the very near future. Yet nearly 18 months have passed since then without Mr. Medjnoune being brought to trial. Consequently, the Committee finds a violation of the rights under article 14, paragraph 3 (c).

9. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts before it disclose violations by the State party of articles 7; 9, paragraphs 1, 2 and 3; and 14, paragraph 3 (a) and (c), of the Covenant.

10. In accordance with article 2, paragraph 3, of the Covenant, the State party is under an obligation to provide an effective remedy, which includes bringing Malik Medjnoune immediately before a judge to answer the charges against him or to release him, conducting a full and thorough investigation into the incommunicado detention and treatment suffered by Malik Medjnoune since 28 September 1999, and initiating criminal proceedings against the persons alleged to be responsible for those violations, in particular the ill-treatment. The State party is also required to provide appropriate compensation to Malik Medjnoune for the violations. In addition, the State party is required to take steps to prevent further occurrences of such violations in the future.

11. Bearing in mind that, by becoming a State party to the Optional Protocol, the State party has recognized the competence of the Committee to determine whether there has been a violation of the Covenant and that, pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the Covenant, the Committee wishes to receive from the State party, within 90 days, information about the measures taken to give effect to its Views. The State party is also requested to publish the Committee's Views.

[Adopted in English, French and Spanish, the French text being the original version. Subsequently to be issued in Arabic, Chinese and Russian as part of the Committee's annual report to the General Assembly.]

Notes

[1] Counsel has provided a written statement made by Malik Medjnoune on the occasion of a visit by counsel to his place of detention in May 2000.

[2] Counsel also refers to NGO reports describing the methods of torture commonly used by the Algerian secret police, and to the annual reports of the Special Rapporteur on the question of torture.

[3] According to Malik Medjnoune's statement, he was taken in February 2000 to a hospital near Blida, where he met this person. He spent a month there, until his first appearance before the prosecutor.

[4] Art. 292: "If the arrest or kidnapping is carried out by persons wearing or appearing to wear official uniform or insignia, as specified in article 246 of the Criminal Code, or persons assuming a false identity or using a bogus official order, the penalty shall be life imprisonment. The same penalty shall apply if the arrest or kidnapping is carried out using a motor vehicle or if the victim's life is threatened."

Art. 293: "If the victim of the kidnapping, arrest, detention or false imprisonment is physically tortured, the offenders shall be liable to the death penalty."

Art. 293 bis: "Any person who, using violence, threats or fraud, kidnaps another person or causes another person to be kidnapped, regardless of age, shall be sentenced to between 10 and 20 years' imprisonment. If the victim is physically tortured, the offender shall be liable to the death penalty. Similarly, if the purpose of the kidnapping was to secure payment of a ransom, the offender shall be liable to the death penalty."

[5] Act No. 90-24 of 18 August 1990, art. 51: "If, for the purposes of the inquiry, the investigating officer is obliged to detain one or more of the persons referred to in article 50, he or she shall immediately inform the public prosecutor; police custody shall not exceed 48 hours. Without prejudice to the confidentiality of the inquiry, the investigating officer shall allow the person in custody to make immediate and direct contact with their family by any means and receive visitors. [...] (Order No. 95-10 of 25 February 1995) All time limits set in this article

shall be doubled in cases relating to attacks on State security. They may be extended to a maximum of 12 days in cases relating to offences constituting terrorist or subversive acts."

[6] Act No. 86-05 of 4 March 1986, art. 125: "In other cases than those referred to in article 124, pretrial detention may not exceed four months; if an extension is required, detention may be extended by the examining magistrate, by reasoned order and in accordance with the procedural provisions set forth in a similarly reasoned request from the prosecutor:

- Once where the maximum penalty provided by law is more than three years' imprisonment;
- Twice in criminal cases.

No extension granted shall exceed a period of four months."

[7] Act No. 86-05 of 4 March 1986, art. 125 bis: "Where the indictments division decides to extend pretrial detention, such extension may not exceed four months and is not renewable."

[8] Act No. 86-05 of 4 March 1986, art. 279: "Any case that is ready for trial shall be brought before the court at its next sitting."

[9] Act No. 82-03 of 13 February 1982, art. 128: "Where a trial court is seized of a case, it is for the court to rule on provisional release; ... prior to committal to the criminal court, and between sittings of the criminal court, such decision rests with the indictments division."

[10] A copy of the notification of the decision can be found in the file, in Arabic with a translation into French.

[11] A copy of the notification of the decision can be found in the file, in Arabic with a translation into French.

[12] Counsel claims that Algerian law does not comply with international standards and cites the Committee's comments to the effect that "delays must not exceed a few days" (general comment No. 8, para. 2); in counsel's view, the lapse of a week between arrest and appearance before a judge is not compatible with article 9, paragraph 3, of the Covenant (communication No. 702/1996, *McLawrence v. Jamaica*, Views adopted on 18 July 1997). Counsel also cites communication No. 44/1979, *Pietravoia v. Uruguay*, Views of 27 March 1981, involving a violation of the same article in respect of a person detained incommunicado for four to six months and then tried by a military court after eight months. Lastly, counsel notes that article 51 of the Algerian Code of Criminal Procedure (Act No. 90-24 of 18 August 1990, as amended by order No. 95-10 of 25 February 1995), which authorizes the security services to detain persons suspected of terrorist offences for 12 days incommunicado are contrary to the letter of the Covenant and the Committee's case law.

[13] Article 123 (Act No. 90-24 of 18 August 1990): "Preventive detention is an exceptional measure. However, where the constraints provided by judicial supervision are insufficient, preventive detention may be ordered or extended:

1. If it is the only means of preserving material proof or evidence or preventing pressure being exerted on witnesses or victims, or collusion taking place between the accused and their accomplices such as to jeopardize the establishment of the truth;

2. If it is necessary to protect the accused or halt the commission or prevent the recurrence of an infraction;

3. If the accused chooses to evade the obligations arising out of the measures of judicial supervision imposed."

[14] The State party gives no further details.

[15] Communications Nos. 146/1983, *Baboeram Adhin et al. v. Suriname*, Views adopted on 4 April 1985, para. 14.2; 139/1983, *Conteris v. Uruguay*, Views adopted on 17 July 1985, para. 7.2; 202/1986, *Graciela Ato del Avellanal v. Peru*, Views adopted on 31 October 1988, para. 9.2; 30/1978, *Bleier v. Uruguay*, Views adopted on 29 March 1982, para. 13.3; 107/1981, *Elena Quinteros Almeida v. Uruguay*, Views adopted on 21 July 1983, para. 11; 992/2001, *Bousroual v. Algeria*, Views adopted on 30 March 2006, para. 9.4.

[16] Communications Nos. 540/1993, *Celis Laureano v. Peru*, Views adopted on 25 March 1996, para. 8.5; 458/1991, *Mukong v. Cameroon*, Views adopted on 24 July 1994, para. 9.4; 440/1990, *El-Megreisi v. Libyan Arab Jamahiriya*, Views adopted on 23 March 1994, para. 5.

[17] Communications Nos. 449/1991, *Mójica v. Dominican Republic*, Views adopted on 10 August 1994, para. 5.7; 1196/2003, *Boucherf v. Algeria*, Views adopted on 30 March 2006, para. 9.6.

[18] See general comment No. 13 (21), para. 8.

[19] Communications Nos. 1128/2002, *Rafael Marques de Morais v. Angola*, Views adopted on 29 March 2005, para. 6.3; 992/2001, *Bousroual v. Algeria*, Views adopted on 30 March 2006, para. 9.6. See also general comment No. 8 (16), para. 2.

[20] Communications Nos. 473/1991, *Barroso v. Panama*, Views of 19 July 1995, para. 8.5; 818/1998, *Sextus v. Trinidad and Tobago*, Views of 16 July 2001, para. 7.2.

SS. Communication No. 1298/2004, *Becerra v. Colombia* (Views adopted on 11 July 2006, eighty-seventh session)*

Submitted by:	Mr. Manuel Francisco Becerra Barney (not represented by counsel)
Alleged victim:	The author
State party:	Colombia
Date of communication:	11 April 2003 (initial submission)
Subject matter:	Trial and conviction of a person involved in the illegal financing of a presidential campaign
Procedural issues:	Failure to exhaust domestic remedies, insufficiently substantiated claim
Substantive issues:	Violation of the right to due process
Articles of the Covenant:	2 and 14
Articles of the Optional Protocol:	2 and 5, paragraph 2 (b)

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 11 July 2006,

Having concluded its consideration of communication No. 1298/2004, submitted to the Human Rights Committee on behalf of Mr. Manuel Becerra Barney under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the author of the communication, and the State party,

Adopts the following:

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* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Nisuke Ando, Mr. Prafullachandra Natwarlal Bhagwati, Mr. Alfredo Castillero Hoyos, Ms. Christine Chanet, Mr. Edwin Johnson, Mr. Walter Kälin, Mr. Ahmed Tawfik Khalil, Mr. Rajsoomer Lallah, Mr. Michael O'Flaherty, Ms. Elisabeth Palm, Sir Nigel Rodley, Mr. Ivan Shearer, Mr. Hipólito Solari-Yrigoyen, Ms. Ruth Wedgwood and Mr. Roman Wieruszewski.

Pursuant to rule 90 of the Committee's rules of procedure, Committee member Mr. Rafael Rivas Posada did not participate in the adoption of the present decision.

Views under article 5, paragraph 4, of the Optional Protocol

1.1 The author of the communication, dated 11 April 2003, is Manuel Francisco Becerra Barney, a Colombian citizen born in 1951. He claims to be the victim of violations by Colombia of article 2, paragraphs 1 and 3 (a) and (c), and article 14 of the Covenant. He is not represented by counsel.

1.2 The Optional Protocol entered into force for the State party on 29 January 1970.

Factual Background

2.1 The author was Comptroller-General and former Colombian Minister of Education, at the time of the events he relates. After the 1994 presidential elections, the Colombian Prosecutor-General launched investigations into the financing of the election campaign run by the President-elect, Ernesto Samper Pizano, who was said to have received drug-trafficking money in the form of donations from members of the Cali cartel. The investigations, of ministers and members of Parliament for the most part, led to what became known as the "8000 trial". They included an inspection of the offices of Chilean citizen Guillermo Alejandro Pallomari González, the main person responsible for the financing of the Cali cartel, during which books were seized and the organization's financial movements were revealed. When questioned, Pallomari incriminated the author in the illegal funding of Ernesto Samper's presidential campaign.

2.2 On 31 January 1996, the author was detained by order of the Prosecutor-General. He states that he was questioned from behind mirrors and was never able to see the individuals questioning him. Once the investigation phase was over, the case was forwarded to the competent government prosecutor's office. By decision dated 26 September 1996, the prosecutor charged the author with receiving drug-trafficking money to finance the election campaign of the then presidential hopeful, accusing him of "illicit enrichment of individuals for the benefit of third parties" and impounding some of the property he owned.

2.3 By a collegial decision dated 22 August 1997, the Cali Regional Court, which was made up of faceless judges, found the author guilty of illicit enrichment of individuals for the benefit of third parties and sentenced him to 5 years and 10 months in prison, a fine of 300 million Colombian pesos (approximately US$ 125,000), the equivalent of what he was said to have received unlawfully, and disqualification from public office or functions for the duration of his sentence. The author states that the trial was held behind closed doors in Cali, and that he was neither present nor represented there, being held in custody in Bogota, some 550 km away. He further states that, although the statements given under interrogation by prosecution witness Guillermo Pallomari were regarded as key evidence during the pretrial proceedings, that evidence has never been presented and his lawyer has, therefore, never been able to question the person who incriminated him. He states that the judge's identity was kept secret.

2.4 The author appealed his sentence before the National Court, claiming procedural irregularities, in particular the fact that the judgement was based on statements made by a witness who was not under oath and in disregard of the principle of adversarial proceedings, and that the trial had been conducted without proper guarantees of due process. He states that the National Court was also made up of faceless judges, that it did not consider the case in a public hearing, and that neither he nor his lawyer was present. By decision dated 24 July 1998, the National Court dismissed the appeal and increased the prison sentence handed down by the lower court to seven years. This, the author maintains, is contrary to the principle of *non reformatio in peius* acknowledged in article 31 of the Colombian Constitution, which prohibits any increase in the sentence handed down in first instance when, as in this case, the convicted individual is the only party to appeal.

2.5 The author applied to have the National Court's ruling quashed, again claiming procedural irregularities besides violation of the principle of *non reformatio in peius*. The Criminal Cassation Chamber of the Supreme Court dismissed the appeal on 2 October 2001.

2.6 On 19 November 2001, the author applied to the Constitutional Court for protection (*tutela*) against the sentences handed down by the appeal court and in cassation proceedings, claiming a violation of the right to due process, equality before the courts and access to the administration of justice. In a ruling dated 3 December 2001, the Disciplinary Jurisdictional Chamber of the Cundinamarca Division Council of the Judiciary granted *tutela* and revoked the sentence handed down by the Supreme Court in cassation proceedings on the grounds that the ban on *reformatio in peius* when the convicted individual is the only party to appeal had been broken. It gave the Cali Court 48 hours to return the case file to the Criminal Cassation Chamber of the Supreme Court for a fresh ruling that fully respected the principle of *non reformatio in peius*.

2.7 By decision dated 19 March 2002, the Supreme Court declined to give effect to the *tutela* ruling, arguing that since the Supreme Court was the highest court of ordinary jurisdiction its judgements had the force of *res judicata* and a remedy of *tutela* was not, therefore, competent. The author points out that this was the first time the Supreme Court had ever declined to give effect to a protective ruling, stressing that previously, in similar cases, the Court had always accepted applications for protection. This refusal to give effect to the ruling, the author says, led to what became known as the "train crash", a face-off between the different public powers, especially between the Supreme Court and a Constitutional Court, resulting from the entry into force of the new Colombian Constitution of July 1991.

2.8 On 17 May 2002 the Branch Council of the Judiciary declared it had no jurisdiction to consider the complaint for contempt of court which the author wished to lodge against the Criminal Cassation Chamber of the Supreme Court, and referred the application for disciplinary action to the House of Representatives in Congress. To date, the Charges Committee of the House of Representatives has not pronounced on the matter of what penalties, if any, should be imposed on the justices of the Criminal Cassation Chamber for failure to accept the protective ruling.

The complaint

3.1 The author claims to be a victim of a breach of article 14, since he was found guilty in first instance and on appeal by faceless judges, both trials were held behind closed doors and he was denied the right to be heard publicly, to defend himself and to question the prosecution witness.

3.2 The author also alleges a violation of article 2, paragraph 1, in the form of discrimination against him by the Supreme Court when it declined to accept the protective ruling awarded in his favour, thereby departing from its previous practice in similar cases.

3.3 Lastly, the author alleges a violation of article 2, paragraph 3 (a) and (c), because the Supreme Court declined to accept the protective ruling, leaving the author without an effective remedy for the violation of his rights as acknowledged in the Covenant.

Observations by the State party on admissibility and comments by the author

4.1 In observations submitted on 1 November 2005, the State party comments that the House of Representatives has yet to pronounce on the complaint for contempt of court lodged by the author against the Criminal Cassation Chamber of the Supreme Court. It adds that a justice of the Supreme Court has lodged an appeal against the protection ruling before the Cundinamarca Division Council of the Judiciary but that appeal has not yet been settled, and as a result the protective ruling is not yet fully in effect. The State party claims that the remedies available under domestic law have not been exhausted, and the communication should therefore be declared inadmissible.

4.2 The State party further maintains that the author's allegations are not adequately grounded in any injury liable to be accepted as a violation of the human rights acknowledged in the Covenant and that, therefore, his complaint is inadmissible.

4.3 On the merits, the State party notes that the Committee has no jurisdiction to determine whether there has been a violation of article 2, paragraphs 1 and 3, since those paragraphs refer to a general commitment made by the State party upon signing the Covenant from which no specific right that individuals may invoke in isolation can be deduced.

4.4 In connection with the author's complaints relating to article 14, the State party asserts that there is not enough information to establish whether there has been a violation of the right to equality before the courts, the author having presented no evidence to indicate that the Supreme Court has actually taken a different course in applications for protection similar to those brought by the author: the allegation is thus baseless.

4.5 Regarding the alleged violation of the right to be publicly heard with all due safeguards, the State party refers to Constitutional Court ruling No. C-040 of 1997 on the legality of proceedings conducted by the regional courts operating at the time of the events in question, among them the proceedings against the author. The State party points out that the Court indicated at that time that a public hearing was not a constitutional requirement of proceedings and was not necessary or obligatory. The legislature was thus entitled to do away with that stage of a trial, as it then did by adopting rules to govern the "Public Order Court" which allowed the court anonymity. The State party says that the expression "to be present" does not, in the Constitutional Court's interpretation, necessarily require the accused to be physically present at the proceedings but rather to be involved for the purpose of exercising the right to a defence. It concludes by saying that the judicial formalities both in first instance and on appeal were completed in the presence of the author's attorney, and the author's right to a defence was thus guaranteed.

5.1 In his comments of 4 January 2006, the author states that he has brought 10 different procedural actions since being convicted in 1996 (10 years ago), including all the ordinary and extraordinary remedies available, and the State party cannot claim that domestic remedies have not been exhausted. He points out that the complaint of contempt of court is not a domestic remedy but a disciplinary measure directed at justices who fail to uphold the constitutional rights to *tutela* or protection, the only effect of which would be to impose penalties on the justices concerned.

5.2 The author challenges the State party's claims that his representative was given a hearing during the trials in first instance and on appeal. He insists that both trials were held behind closed doors, that there was no oral or public hearing at any time, and that neither he nor his representative was allowed to be present, especially since the identity of the judges who handed down the various sentences was kept secret. He draws attention to the contradiction between the State party's claims acknowledging and justifying the practice of conducting trials without a public hearing and the later claim that his lawyer was given a hearing. He reaffirms, as stated in his initial claims, that his defence was always conducted in writing, that he never knew who his judges were, and that his lawyer was never permitted to question the prosecution witness.

Issues and proceedings before the Committee

Material issues and special pleas

6.1 Before considering any claim contained in a communication, the Human Rights Committee must, in accordance with rule 93 of its Rules of Procedure, decide whether or not the communication is admissible under the Optional Protocol to the Covenant.

6.2 The Committee has ascertained that the same matter is not being examined under another procedure of international investigation or settlement for purposes of article 5, paragraph 2 (a), of the Optional Protocol.

6.3 On the exhaustion of domestic remedies, the Committee notes the State party's assurance that a complaint of contempt of court against the justices of the Criminal Cassation Chamber of the Supreme Court is under consideration in the House of Representatives. However, the Committee also notes the author's statement that this complaint is a disciplinary measure directed against those justices and not an appeal which would allow his case to be reviewed. The State party cannot, therefore, claim that the author should wait for the House of Representatives in Congress to pronounce on his complaint before the Committee can consider the case under the Optional Protocol, especially when the complaint has been pending before the House for four years and does not afford a real opportunity for the author's case to be reconsidered.

6.4 The Committee further notes the State party's allegations that the protective ruling (*tutela*) has been challenged by a Supreme Court justice and that, therefore, domestic remedies have not been exhausted. The Committee observes that the challenged ruling granted protection to the author and that it is that very ruling which the Supreme Court declined to give effect to. That being so, the challenge to this ruling is irrelevant for the purpose of affording the author an effective remedy within the meaning of article 5, paragraph 2 (b), of the Optional Protocol.

Consideration of the merits

7.1 The Committee has considered this communication in the light of all the information made available to it by the parties, as required by article 5, paragraph 1, of the Optional Protocol.

7.2 The Committee takes note of the author's claims that he was tried and convicted in first instance and on appeal by courts made up of faceless judges, without the due safeguards of a public hearing and adversarial proceedings, and in particular that he was not allowed to be present and defend himself during the trial, either personally or through his representative, and had no opportunity to question the prosecution witness. It points out that, to satisfy the requirements of the right to defence guaranteed under article 14, paragraph 3, of the Covenant, all criminal proceedings must allow the accused the right to an oral hearing at which he or she can appear in person or be represented by legal counsel, submit such evidence as he or she deems relevant and question the witnesses.[1] Bearing in mind that the author was not given such a hearing during the proceedings which culminated in his conviction and sentencing, the Committee concludes that his right to a fair trial as established in article 14 of the Covenant was violated.

7.3 In light of the above findings, the Committee does not consider it necessary to deal with the complaint in respect of article 2, paragraph 3, of the Covenant.

8. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol, is of the view that the facts before it constitute a violation of article 14.

9. In accordance with article 2, paragraph 3 (a), of the Covenant, the State party is under an obligation to provide the author with an effective and appropriate remedy.

10. Bearing in mind that, by becoming a State party to the Optional Protocol, the State party has recognized the competence of the Committee to determine whether there has been a violation of the Covenant or not and that, pursuant to article 2 of the Covenant, the State party has undertaken to guarantee all individuals within its territory and subject to its jurisdiction the rights recognized in the Covenant, the Committee wishes to receive from the State party, within 90 days, information about the measures taken to give effect to its Views. The State party is also requested to publish the Committee's Views.

[Adopted in English, French and Spanish, the Spanish text being the original version. Subsequently to be issued in Arabic, Chinese and Russian as part of the Committee's annual report to the General Assembly.]

Note

[1] Communication 848/1999, *Rodriguez Orejuela v. Colombia*, decision dated 23 July 2002, para. 7.3.

TT. Communication No. 1314/2004, *O'Neill and Quinn v. Ireland* (Views adopted on 24 July 2006, eighty-seventh session)*

Submitted by:	Michael O'Neill and John Quinn (represented by counsel, Mr. Michael Farrell)
Alleged victim:	The authors
State party:	Ireland
Date of communication:	14 September 2004 (initial submission)
Subject matter:	Discrimination by the executive with respect to the application of an early release scheme for prisoners
Procedural issues:	None
Substantive issues:	Equality before the law and equal protection of the law
Articles of the Covenant:	9, paragraph 1; 14, paragraph 1; 26; 2, paragraphs 1 and 3
Articles of the Optional Protocol:	None

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 24 July 2006,

Having concluded its consideration of communication No. 1314/2004, submitted to the Human Rights Committee on behalf of Michael O'Neill and John Quinn under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the author of the communication, and the State party,

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* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Nisuke Ando, Mr. Prafullachandra Natwarlal Bhagwati, Ms. Christine Chanet, Mr. Maurice Glèlè Ahanhanzo, Mr. Edwin Johnson, Mr. Walter Kälin, Mr. Ahmed Tawfik Khalil, Mr. Rajsoomer Lallah, Ms. Elisabeth Palm, Mr. Rafael Rivas Posada, Mr. Ivan Shearer, Mr. Hipólito Solari-Yrigoyen, Ms. Ruth Wedgwood and Mr. Roman Wieruszewski.

Pursuant to rule 90 of the Committee's rules of procedure, Committee member Mr. Michael O'Flaherty did not participate in the adoption of the present decision.

The texts of three individual opinions signed by Committee members Mr. Hipólito Solari-Yrigoyen, Mr. Edwin Johnson, Mr. Rafael Rivas Posada, Ms. Ruth Wedgwood, Mr. Rajsoomer Lallah and Ms. Christine Chanet are appended to the current document.

Adopts the following:

Views under article 5, paragraph 4, of the Optional Protocol

1. The authors of the communication are Michael O'Neill and John Quinn, both Irish nationals, born on 10 February 1951 and 8 November 1967, respectively. They claim to be victims of violations by Ireland of their rights under article 2, paragraphs 1 and 3; article 9, paragraph 1; article 14, paragraph 1; and article 26, of the International Covenant on Civil and Political Rights. The Optional Protocol entered into force for Ireland on 8 March 1990. They are represented by counsel, Mr. Michael Farrell, Solicitor.

Factual background

2.1 On 3 February 1999, Michael O'Neill was convicted by the Special Criminal Court of the manslaughter of a police officer (Garda), Detective Garda Jerry McCabe (hereinafter referred to as "Garda McCabe"), the malicious wounding of another police officer and possession of firearms with intent to commit an offence. These offences arose out of an attempted robbery of a mail van in Adare, Co. Limerick, Ireland, on 7 June 1996. Mr. O'Neil pleaded guilty and he was sentenced to 11 years imprisonment on the charge of manslaughter and two terms of five years imprisonment on the other charges; all sentences to run concurrently. Although he had been in custody since 20 June 1996, the sentences were dated from February 1999 and he is due for release with full remission on 17 May 2007.

2.2 In February 1999, Mr. Quinn pleaded guilty to and was convicted of conspiring to commit the above mentioned robbery by the Special Criminal Court and was sentenced to six years' imprisonment. He was released on 8 August 2003, after completing his sentence with normal remission. Three other persons were convicted of the manslaughter of Garda McCabe, the malicious wounding of the other policeman, and possession of firearms with intent. They were sentenced to terms of imprisonment ranging from 12 to 14 years.

2.3 The attempted robbery was carried out on behalf of the Provisional Irish Republican Army (IRA), an illegal paramilitary organization involved in the armed conflict in Northern Ireland, which frequently spilled over into Great Britain and the State party. The robbery and shooting were initially denied by the Provisional IRA but were subsequently admitted by it. All five persons convicted were recognized by the Irish Prison Authorities and the Department of Justice, Equality and Law Reform, (hereafter referred to as the Department of Justice), as belonging to the Provisional IRA and were held in a separate part of the prison reserved for such prisoners.

The Good Friday Agreement and the release of prisoners' scheme

2.4 There was a prolonged and violent conflict in Northern Ireland since the beginning of the 1970s. In August 1994, the Provisional IRA had declared a ceasefire followed by similar declarations by Loyalist paramilitary groups, i.e. groups supporting the continuance of the connection between Northern Ireland and the United Kingdom. The IRA resumed its violent campaign in February 1996, and it was during this period that the offence in question occurred. A ceasefire was declared in September 1997, which has lasted to date.

2.5 On 10 April 1998, a formal international agreement between the Governments of the United Kingdom and Ireland, (the British-Irish Agreement) and a political agreement between the two Governments and the various political parties was reached (Multi-Party Agreement). Under the terms of the former agreement the two Governments, inter alia, undertake as a matter of international law "to support and, where appropriate implement, the terms of the Multi-Party Agreement". This package of agreements was formally known as the "Agreement reached in the Multiparty Negotiations", but is generally referred to as the Good Friday Agreement (hereinafter referred to as the "GFA").

2.6 One section of the GFA, entitled "Prisoners" provided that both the United Kingdom and Irish Governments would establish mechanisms to enable the early release of prisoners convicted of "scheduled offences" in Northern Ireland or similar offences committed elsewhere. "Scheduled offences" were offences committed by or on behalf of paramilitary organizations connected with the Northern Ireland conflict. Prisoners affiliated to organizations which were not maintaining complete and unequivocal ceasefires would not benefit from the early release provisions. It was envisaged under the GFA that all qualifying prisoners would be released at the end of two years after commencement of the scheme if not before.[1]

2.7 The Prisoner Release scheme was implemented in the State party by the Criminal Justice (Release of Prisoners) Act, 1998 (hereinafter referred to as "the 1998 Act"). The 1998 Act did not confer new release powers on the Minister for Justice, Equality and Law Reform (hereafter referred to as "the Justice Minister"). The releases were to be effected under existing discretionary powers (section 33 of the Offences against the State Act 1939, see para. 4.3 below), but the Act provided for the establishment of a Commission to advise the Justice Minister in relation to the release of prisoners pursuant to the GFA. The Act provided, however, that the Commission could only advise the Minister in relation to prisoners who had already been specified by him to be "qualifying prisoners for the purposes of the Good Friday Agreement". Accordingly, the key decision in relation to the release of any prisoner under the scheme was the decision as to whether or not that person was a "qualifying prisoner".[2] On 28 July 1998, the release scheme commenced. In a joint statement issued on 5 May 2000, the Prime Ministers of the United Kingdom and Ireland stated "It is intended that, in accordance with the GFA, all remaining prisoners qualifying for early release will be released by the 28th July 2000". Figures issued by the two Governments on 14 July 2001 confirmed that 444 qualifying prisoners had been released in Northern Ireland under the GFA, and 57 had been released in the State party.

The authors' requests for release

2.8 On 25 July 2000, the authors wrote to the Justice Minister requesting confirmation that he had specified them as "qualifying prisoners" for the purpose of the early release scheme, and requesting their release pursuant to the GFA and the 1998 Act. They added that if the Minister did not intend to accede to this application, he should furnish them with the reasons for his decision and give them the opportunity to make representations in connection therewith. By 30 July 2001, and despite a number of further letters to the Minister, the authors had received only acknowledgements of receipt of these letters. During this period, the Justice Minister had made a number of statements, both publicly and in letters to private individuals, to the effect that prisoners convicted in connection with the death of Garda McCabe would not be released under the GFA. According to the authors, a number of prisoners had been released in the State party who had been convicted of offences as grave as or graver than those committed by the authors, including the Offence of Capital Murder of members of the police force.[3] A large number of prisoners had been released in Northern Ireland, who had been convicted of the murder of police officers there.

2.9 In or around 2002, the authors obtained four documents from the Department of Justice, under freedom of information legislation. The first document dated, 4 October 2000, set out "the criteria for consideration under the provisions of the Good Friday Agreement" namely that the prisoners' "offences pre-date the GFA and were committed on behalf of an organization to which the terms of the GFA apply". The document gave a list of persons who had been sentenced to life imprisonment for murder and whom it recommended should be referred to the Release of Prisoners Commission. One of the persons listed had been convicted of the murder of a member of the police force (Garda Siochana), and the documents stated that other persons convicted with him for that murder had already been released under the terms of the GFA. The second document, undated, indicated that prisoners convicted before the Special Criminal Court in the State party, in respect of offences similar to scheduled offences in Northern Ireland, which had been committed before the signing of the GFA, and who were affiliated to the Provisional IRA or another paramilitary organization called the INLA, would qualify for release under the terms of the GFA. According to the authors, the offences committed by them clearly came within the criteria set out in these two documents.

2.10 The third document was in question and answer form, and indicated that prisoners convicted after 10 April 1998, (the date of the conclusion of the GFA) for offences committed before that date would be covered by the early release scheme, with the exception of any persons "convicted of the murder" of Garda McCabe. The document went on to discuss how long prisoners convicted after 10 April 1998 of pre-GFA offences would have to serve before they would be released. This document acknowledged that an exception was being made in the case of persons convicted of the murder of Garda McCabe and said that "this was a political judgement made against the background of the need to ensure public support for the terms of the GFA". The document said that "persons convicted of the murder of other Gardai [police officers] - who have already served long sentences - will be covered by the prisoner release arrangements". The fourth document, dated 17 August 2001, is a letter from the Irish Prisons Service, (then a division of the Department of Justice) addressed to the Governor of Portlaoise Prison and to a prisoner whose name had been erased, but who had sought early release under the GFA. It stated that the Minister was not inclined to specify the prisoner concerned as a qualifying prisoner and gave the Minister's reasons for this. However, it invited the prisoner to make further representations if he so wished.

2.11 On 30 July 2001, as no reply had been forthcoming from the Justice Minister, the authors applied to the High Court and were granted leave to take judicial review proceedings seeking, inter alia, a declaration that they were "qualifying prisoners" for the purposes of the GFA and the 1998 Act. Judicial review in the State party proceeds by way of affidavit evidence. The respondents did not file any replying affidavits and did not contradict any of the evidence adduced on behalf of the authors. By letter of 5 June 2002, the Justice Minister replied to the authors' request to be specified as qualifying prisoners, stating that they had not been specified and that any such decision referred "to privileges or concessions" and was not subject to the procedures that had been requested by the authors.

2.12 On 26 and 27 November 2002, the authors' case was heard in the High Court and judgement was given on 27 March 2003. The judgement states that " ... it seems clear and it is not in fact contested by the respondents, since they have filed no affidavit, that the applicants, were they to be considered for release by the Minister, do fall within the category of prisoner who would be eligible for release under the relevant provisions. "However, it was held that section 3 (2), of the 1998 Act, gave the Minister "an absolute discretion" as to whether to request advice from the Release of Prisoners Commission about whether or not to release individual prisoners. Accordingly, there was no obligation on the Minister to consider any particular person for release. Thus, he could not be said to have acted capriciously, arbitrarily or unjustly in refusing to specify the authors as qualifying prisoners. He dismissed their application for judicial review.

2.13 The authors appealed to the Supreme Court which gave judgement on 29 January 2004. The Court noted that although it was undisputed that at the time the offences were committed and the authors were convicted, they were affiliated to the Provisional IRA, "it is accepted that neither of the applicants is now affiliated to an organization which is not maintaining a complete and unequivocal cease-fire". The Court referred to the Question and Answer document (para. 2.10 above). It held that the GFA had not been incorporated into Irish law and conferred no specific rights on individuals. The power to release prisoners was a "quintessentially executive function and a discretionary one." However, it held that the High Court judge's characterization of this discretion as "absolute" was too wide - any such power had to be exercised in good faith and not in an arbitrary, capricious or irrational manner.

2.14 In conclusion, the Court distinguished between the authors' case and those of other prisoners who had been released after committing equally or more serious crimes, on the grounds that the latter group had all been tried and convicted at the time the GFA was concluded. Given this distinction, the Court held that to make a decision that no one convicted in connection with the murder in question should be released, was "a policy choice, which it was entirely within the discretion of the Executive to make, and could not be characterised as capricious, arbitrary or irrational". It rejected the claim that the refusal to specify them as qualifying prisoners constituted unfair discrimination between them and others who had committed crimes of equal or greater gravity, and reiterated that, on the basis of the presumed distinction, the authors were not in the same position as those convicted of similar or graver offences. The Supreme Court rejected the authors' appeal.

2.15 According to the authors, the distinction made by the Supreme Court between the authors and those convicted with them, and other persons released under the GFA, was not put to counsel for the authors during the hearing. They were given no indication that the Court regarded this as a significant issue. It was mentioned in one speculative query by the Chief Justice during a series of exchanges between members of the Court and counsel for the respondents, a query to which counsel did not respond. It was factually erroneous, too. The question and answer document obtained under freedom of information legislation (para. 2.10 above) and referred to in both the High Court and Supreme Court judgements, had made it clear that the release provisions applied to persons convicted after the GFA as well as before it. In fact, two persons had been released in the State party who had been convicted after the GFA for offences committed before it, and at least eleven persons convicted after the GFA for pre-GFA offences had been released in Northern Ireland, confirming that the authorities there made no such distinction between convictions imposed before or after 10 April 1998. The cases in question had not been specifically drawn to the attention of the High Court as no one had sought to make such a distinction. It was undisputed in the High Court that, were the authors to be considered by the Minister, they would fall into the category of persons who would be eligible for release under the relevant provisions. This was not contested by the respondents. Similarly, this information had not been brought to the attention of the Supreme Court because, as an appellate Court, it proceeds on the basis of the evidence that was before the lower Court. In this case, neither side had sought to challenge the finding by the High Court that the authors met the criteria for eligibility for the early release scheme.

2.16 On 12 February 2004, the authors issued a motion seeking to have the judgement and order of the Supreme Court set aside or corrected and seeking a re-hearing of their appeal. The grounding affidavit for the application gave details of the two persons who had been released in the State party following post GFA convictions, and also of a larger number of persons in similar circumstances who had been released in Northern Ireland. In a sworn affidavit of 4 March 2004, the respondents confirmed the release of the two individuals convicted after the GFA but denied that their cases were comparable to those of the authors. On 1 April 2004, the authors' application was heard by the same panel of the Supreme Court, which held that the facts in relation to the point at issue, "were agreed and were not in issue at any stage in the case". The Court was satisfied that counsel for the authors had every opportunity to deal fully with the matter and dismissed the application.

The complaint

3.1 The authors claim that they were discriminated against, under articles 2, paragraph 1, and 26, by the refusal of the Justice Minister to specify them as qualifying prisoners under the 1998 Act. They claim that they meet all the criteria for release under this scheme, set out in the four documents abovementioned, which originated from the Department of Justice, but that the Justice Minister arbitrarily refused to include them in the scheme. They claim that they are the only persons meeting the criteria who have been excluded from the scheme and that other persons convicted of comparable and even graver offences were specified as qualifying prisoners.

3.2 The authors argue that the Justice Minister's discretion must not be exercised in an arbitrary, irrational or discriminatory manner, and must be exercised within the criteria used in administering the early release scheme. Prior to the judicial review proceedings, no reasons were given for the authors' exclusion. The reason given after the commencement of proceedings did not relate to the objectives of the scheme but to extraneous political considerations. Furthermore, the authors were not afforded the benefit of procedures that were afforded to other prisoners seeking early release, namely an invitation to make representations prior to determination of the applicant's claim. Thus, the authors were discriminated against in the way that their applications were dealt with and by the refusal to specify them as "qualifying prisoners", and to grant them release.

3.3 The authors claim a violation of article 9, paragraph 1, since although they were originally detained pursuant to a valid court decision, their continued detention became arbitrary, following the Justice Minister's refusal, on discriminatory grounds, to include them in the early release scheme. They also claim that they were denied a fair hearing under article 14, paragraph 1, in that the Supreme Court dismissed their appeal on grounds which were manifestly erroneous, not having afforded the authors' legal representatives an opportunity to make submissions on or to rebut the incorrect assumption upon which the Court based its decision.

The denial of a fair hearing was compounded by the refusal of the Supreme Court to set aside or vary its decision when presented with evidence that that decision was based on an erroneous assumption.

3.4 The authors claim that they were denied an effective remedy, under article 2, paragraph 3, because the State party's courts failed to protect them against discrimination in the operation of the early release scheme, including the denial of procedures made available to other prisoners. They also claim that they were denied an effective remedy because there was no avenue of redress after the Supreme Court had rejected their appeal on clearly erroneous grounds, and failed to afford them fair procedures during the hearing of their appeal.

3.5 Finally, the authors claim that the decision of the Supreme Court to award costs against them in respect of their application to set aside the Court's decision or to agree to a re-hearing of their appeal was a breach of their right to an effective remedy. It is argued that his decision penalised the authors for attempting to secure redress for a decision based on incorrect facts. The authors claim that they should have been afforded a forum where this could be reasonably assessed and corrected if their contention was found to have merit. Instead, the same panel of the Supreme Court simply refused to reconsider the factual decision, suggesting instead that the authors' representatives had had adequate opportunity to rebut findings of fact.

The State party's submission on admissibility

4.1 On 22 December 2004, the State party contests the admissibility of the communication. It confirms the facts as set out by the authors with respect to the incident of which they were convicted. It submits that prior to commission of the offences, the State party had been engaging in difficult and sensitive negotiations, known as the "peace process", with the United Kingdom and a number of interested political parties in Northern Ireland. It states that the offences caused outrage throughout the State and that, during the trial, prosecution witnesses refused to give evidence or contended that they could not recall anything of the event. It submits that the GFA is a matter of considerable political, historical, constitutional and legal significance in Ireland. To consent to be bound by the British-Irish Agreement, and pursuant to its obligations under the Multi-Party Agreement, the State party's Government proposed amendments to the Irish Constitution, which were approved by referendum on 22 May 1998.

4.2 The State party submits that the authors were never deemed to come within the remit of the early release scheme. Before, during and after the negotiation of the GFA, the passage of the Amendment to the Irish Constitution and the introduction of the 1998 Act, the State party's Government repeatedly made clear that any provisions for the release of prisoners would not apply to any person convicted of involvement in the incident in which Garda McCabe was murdered. On successive occasions, members of the State party's Government made public pronouncements to this effect. The authors would have known that they would be excluded, through the negotiations of the GFA, the statements of members of Government in Parliament, in the print and other media and in the context of the referendum to amend the Constitution. At the time of submission, the State party stated that the negotiations of the GFA were at a critical point and that political representatives of the IRA were requesting the release of those convicted of involvement in the incident in question, under the provisions of the GFA. Without prejudice to its belief that these prisoners are not covered by the GFA, the State party's Government was prepared to consider their release as part of a final comprehensive agreement, which included independently verified decommissioning of all weapons, a complete end to paramilitary activity and an unambiguous end to all forms of IRA criminality. It submitted that the fact that the peace process had reached such a critical phase rendered inappropriate the authors' communication to the Committee on what is essentially a political issue intrinsic to the current negotiations.

4.3 For the State party, all of the authors' claims are inadmissible for being outside the scope of the Covenant. Under Irish law there is no right to released and no obligation on the State party's Government to release prisoners. There is no such right conferred either by the GFA, or the 1998 Act and this conclusion was reached by the Supreme Court in *Doherty v. Governor of Portlaoise Prison*. The authors were convicted after a trial held in due course of law. They also had an opportunity to challenge the decision of the executive arm of State to refuse them early release proceedings in the High and Supreme Courts. The State party explains that the power of commutation and remission of sentence imposed by a Special Criminal Court is provided for by section 33 of the Offences against the State Act 1939 in the following terms:

> "Except in capital cases, the Government may, at their absolute discretion, at any time, remit in whole or in part, or modify (by way of mitigation only) or defer any punishment imposed by a Special Criminal Court."

4.4 According to the State party, this discretion is to be exercised in broad terms. When the executive exercises such power or when discretion is conferred upon it, it is expected that the decision will be one of essentially political judgement, in contrast to a judicial or quasi judicial determination. It is something for which, under article 28.4 of the Constitution, the Government is primarily responsible to the Irish Parliament (the Dáil). Any exercise of discretion must, however, be within the confines of the Constitution either express or implied. The State party confirms that the enabling provisions of the 1998 Act allow a Minister to deem a person to be a "qualifying prisoner", but that the 1998 Act does not purport to confer any additional power of commutation or remission of sentence.[4] The Advisory Commission, if requested, would provide non-binding advice to the Justice Minister. The mechanism created by the 1998 Act, thus creates, a further layer of discretion to be exercised by the Government under provisions such as Section 33 of the Offences against the State Act 1939.

4.5 According to the State party, the High Court and Supreme Court rejected the contention that the Justice Minister's discretion had been exercised in an arbitrary or capricious manner. The Courts accepted the argument that, in the light of the clear policy expressed by the Government publicly, those persons convicted of involvement in the incident in which Garda McCabe was murdered, would not benefit from the early release provisions of the 1998 Act. Thus, it could not be said that a decision to implement that established Government policy was either arbitrary or capricious. The State party adds that its Government must retain an entitlement to adopt a political stance on what a quintessentially political issue. It was the Government's judgement that public support for the GFA would be undermined if the early release scheme was available to those who were involved in the incident in which Garda McCabe was murdered. According to the State party, the authors' claims are tantamount to suggesting that the Human Rights Committee should intervene in the political arrangements, agreements and understandings of the various parties involved in the attempted settlement of the Northern Ireland conflict. In its view, the parties involved ought to be afforded a degree of latitude to carry out their negotiations and mutual obligations.

4.6 More particularly, the State party submits that the claims are outside the scope of articles 26 and 2. It was successfully argued before the domestic courts that the essence of any equality claim is that like persons must be treated alike. All persons convicted in relation to the incident in question were treated alike with respect to the prisoner release scheme. Those involved in the murder of Garda McCabe were deemed to constitute a different group of prisoners to whom any arrangements made pursuant to the GFA would not apply. The authors were aware of this and pleaded guilty when the Government's policy had been clearly announced. They differ from other possible beneficiaries of the scheme because the State party's Government considered that their release would not be tolerated by the People of Ireland. The State party rejects the argument that the fact that a discretionary State privilege has been granted to others in comparable circumstances gives rise to a legally enforceable right; in this context, it refers to the United States Supreme Court's judgement in *Connecticut Board of Pardons v. Dumshcat*.[5] It argues that discrimination is permitted under article 26 if reasonable and objective criteria are applied, as in this case. As regards the conduct of the State party in releasing prisoners under the 1998 Act, it is submitted that "an analysis of statistics and other material does not assist the authors."

4.7 The State party submits that the crimes and the issues surrounding them were not comparable to other crimes. The incident in question occurred during a breakdown in the IRA cease-fire, at a stage when the State party's Government was involved in high level negotiations which would lead to the GFA. This was the first time anyone had been convicted of the murder of a police officer since the IRA's ceasefire. The violence used by the perpetrators was particular savage, the victims were members of the Irish police force and senior members of the provisional IRA were involved in the incident. As to the claim under article 9, the State party submits that it is outside the scope of the Covenant. It contests the claim that the authors' detention is/was arbitrary and invokes the Committee's jurisprudence that "arbitrariness is not to be equated with against the law but must be interpreted more broadly to include elements of inappropriateness, injustice and lack of predictability".[6] The authors served a sentence handed down by the appropriate judicial authorities in Ireland and nothing in domestic law required them to be released before the expiry of their sentences. The requirement to complete their sentences was predictable in light of Government policy.

4.8 The State party submits that the claims are outside the scope of article 14, in that this provision deals with procedural guarantees for trials and not with the substance of judgements handed down by courts. Where judicial error occurs in relation to the evaluation of the factual material before the court, it is not cognisable within the protections of the Covenant. The Committee should not operate as a fourth instance court, with the competence to review or re-evaluate findings of fact.[7] The authors' criticisms relate to what they perceive as erroneous findings of fact made by the Supreme Court in its determination of their application. The State party notes that the Court reviewed its judgement and was satisfied that the parties had had an opportunity to present and rebut all material before it. The same arguments apply to the claim under article 2.

4.9 The State party concludes that for these reasons, the communication should be declared inadmissible and requests that the admissibility of the communication be considered separately from the merits. On 28 December 2004, the Special Rapporteur on new communications determined that the admissibility should be considered by the Committee at the same time as the merits.

The State party's submission on the merits

5.1 On 23 March 2005, the State party comments on the merits and largely reiterates its arguments made on admissibility. As to factual developments, it submits that negotiations have been ongoing for an agreement on the outstanding aspects of the GFA. As to the State party's indication that it would consider the authors' early release in the context of securing a comprehensive settlement, an announcement by the Prime Minister (Taoiseach) in the Parliament (Dáil) to this effect had provoked strong public criticism and much debate in early December 2004. On 20 December 2004, the Northern Bank in Belfast was robbed by, it is believed, the IRA. Since this event, it has been made clear by the State party's Government that the question of the early release of those involved in the incident in which Garda McCabe was murdered is no longer considered. In a statement on 13 March 2005, the prisoners themselves stated that they did not want their release to be part of any further negotiations with the State party's Government.

5.2 The State party confirms that 57 prisoners have been released to date in Ireland under the terms of the GFA. With the exception of those who were released earlier under temporary release, the cases of these prisoners were referred by the Minister to the Release of Prisoners Commission, for advice with respect to the exercise of the power of release, in accordance with Section 3 (2) of the 1998 Act. Three of the prisoners released were convicted after the GFA and released in June, July and September 2000. The prisoners had been convicted of the possession of explosives, firearms and ammunition and had been sentenced for between four and seven years.

The authors' comments on the State party's submission

6.1 On 3 June 2005, the authors comment on the State party's submission. They consider the State party's political arguments irrelevant and inappropriate. The GFA goes to some lengths to stress that respect for human rights must be an integral part of the peace process. Such respect would not be enhanced if the Committee refrained from examining allegations of breaches of human rights at sensitive points during political negotiations. In any event, the authors confirm that neither they nor the State party's Government wish their release to be part of further negotiations. Thus, the State party's objection to the Committee considering this case on political grounds would appear to have lost its foundation. Further, they argue that the State party's Government did not suggest to the Irish Courts that it would be inappropriate or improper for them to consider the authors' judicial review application.

6.2 The authors argue that they are not claiming that they enjoy a right to early release. They claim that where a special scheme has been introduced to grant early release to a defined group of prisoners, and where the authors appear *prima facie* to belong to that group, they have a right not to be discriminated against in the application of that scheme, unless reasonable and objective grounds are given for such discrimination. In this connection, the authors refer to the Committee's Views in *Kavanagh v. Ireland*.[8] As to the State party's suggestion that decisions by the Minister in relation to this scheme may not generally be reviewed, the authors note that the Supreme Court expressly held that the Minister's discretion must be exercised in conformity with the Irish Constitution and in a manner which was not arbitrary, capricious or irrational. As the State party is party to the Covenant, the Minister's discretion must be exercised in a non-discriminatory way, save upon reasonable and objective grounds. The authors accept that the power to release prisoners early is contained in pre-existing legislation rather than in the 1998 Act. However, what distinguishes this matter from the general prisoner release regime is that the State party committed itself, by an international agreement, to release a specific category of prisoners and then, by legislative and administrative action, established the criteria and a defined procedure for doing so. The State party itself confirmed that "the enabling provisions of the 1998 Act allow a Minister to deem a person to be a 'qualifying prisoner'".

6.3 According to the authors, a special procedure was established for dealing with applications under the GFA early release scheme, the benefit of which was denied to the authors. The existence of this procedure is confirmed in at least three cases considered by the State party's courts.[9] In these cases, the applicants for early release were afforded an opportunity to make representations before a negative decision was taken. In one of these cases, *O'Shea v. Ireland, the Government and the Attorney-General*, Mr. Kenny of the Prisons Division of the Minister's Department stated in an Affidavit that: "It is clear that there was a procedure in place for determination of applications of this nature. It is also clear that this procedure has been put in train and that the applicant has been treated as having made an application under the 1998 Act." According to the authors, the existence of a procedure distinguishes the GFA early release scheme from the issue that arose in the case of *Connecticut Board of Pardons v. Dumschat*, which concerned general applications for parole. In addition, the authors point out that the US Court's approach in Dumschat differs markedly from that of the European Court and Commission of Human Rights, which is closely related to the Covenant.[10]

6.4 As to the State party's argument that the authors and others convicted with them were specifically excluded from the early release scheme by a series of Government pronouncements concerning them, the authors recall that the second named author was not convicted of the killing of Garda McCabe nor convicted "in connection with this murder". He was convicted of conspiracy to commit robbery and it was not alleged that he was even in the location of the murder at the time in question. The 1998 Act was couched in general terms and contained no provision excluding the authors or other persons who might be convicted in connection with the murder of Garda McCabe or the events in Adare. If it was (as is asserted) the Government's intention that such persons should be specifically excluded from the early release scheme, for which *prima facie* they fulfilled all the criteria, an express exception to that effect could have been inserted into the legislation, especially since, under Irish law, what is said by Government Ministers in parliament or elsewhere is not admissible for the purpose of interpreting legislation. In the circumstances, the pronouncements by the Minister and similar comments by the Prime Minister (An Taoiseach) had only the standing of opinions or interpretations of the early release scheme and the 1998 Act. Once the scheme was operative, it was for the Minister to administer it in accordance with the criteria laid down, and for the Courts to interpret it in case of dispute. It would not be unusual for Courts to interpret legislation differently from and sometimes in a manner contradictory to what the Government may assert. In the authors' view, it was quite improper for the Minister to repeatedly prejudge the position in relation to them, whose applications under the scheme he would, in due course, have to consider.

6.5 The authors clarify that their claim under article 9, paragraph 1, of the Covenant is dependent upon a finding that they were improperly discriminated against in being denied access to the early release scheme, and that they were not afforded a proper procedure for determining their entitlement to benefit from the scheme. In addition, the Minister had publicly pre-judged their applications and they were denied access to an alternative decision-maker who would employ fair procedures in determining their entitlement or reviewing the Minister's refusal.[11] In the authors' view, the Committee's Views in *Von Alphen v. the Netherlands*,[12] also referred to by the State party (para. 4.7) support the view that a detention, which was initially lawful, can become arbitrary due to a subsequent breach of the authors' rights. According to the authors, their claim under article 14, paragraph 1, is not, as suggested by the State party, a complaint primarily about the outcome of their case, nor does it request the Committee to act as a fourth instance over Irish Courts. Instead, it complains about the procedure in the domestic courts which led to the finding against the authors. The authors argue that this is not inconsistent with the Committee's Views cited by the State party (para. 4.8).

6.6 As to the references in the State party's submission on the merits to further political developments, the authors reiterate that such information is irrelevant. This information included developments which occurred many years after the imprisonment of the first named author, who has been in custody since 1996, and the second named author, who was imprisoned between 1999 and 2003. The authors had no involvement in these later events and the inclusion of references to a major bank robbery in Belfast in December 2004, is both irrelevant and highly prejudicial. As to the argument that this case was a unique incident in the history of the Northern Ireland conflict, the authors submit that none of the factors listed by the State party were unique, and the authors set out in their pleadings in the domestic courts details of a number of other persons convicted of very similar and equally grave offences who were granted early release. Moreover, this argument was not put to the domestic courts and is not sustainable. The effects of the Northern Ireland conflict over many years resulted in many brutal killings and a number of the persons responsible for those killings have been released by the Minister under the GFA. The authors confirm the State party's argument, that no-one else has been convicted of the killing of a Garda related to the Northern Ireland conflict since the IRA ceasefire in 1994, but dismiss this argument as irrelevant. The Minister's criteria for qualifying prisoners did not set different qualifying dates for different types of offences.

Issues and proceedings before the Committee

Consideration of admissibility

7.1 Before considering any claim contained in a communication, the Human Rights Committee must decide, in accordance with rule 93 of its rules of procedure, whether the claim is admissible under the Optional Protocol to the Covenant.

7.2 As required under article 5, paragraph 2 (a), of the Optional Protocol, the Committee has ascertained that the same matter is not being examined under another procedure of international investigation or settlement.

7.3 The Committee notes the State party's general argument that the decision to exclude the authors (and those involved in the incident in which Garda McCabe was murdered) from the early release scheme was based on political concerns, at a critical time in the Northern Ireland peace process, and for this reason it would be inappropriate for the Committee to consider the communication. The Committee considers that its competence to consider individual communications is not affected by ongoing political negotiations in a State party or between States parties. It also notes that the State party's own Courts judicially reviewed the executive's decision and the political nature of the challenged decision does not appear to have been at issue. Indeed, the Supreme Court itself found that the Minister's power to release, although discretionary, must be exercised in good faith and not in an arbitrary, capricious or irrational manner. Thus, the Committee considers that it is not precluded from considering the communication on this ground.

7.4 The Committee considers that the other arguments advanced by the State party, that the claims are outside the scope of the Covenant, are inherently arguments relating to the substance of the communication and thus should be more appropriately dealt with under the merits. As the Committee finds no other reason to consider the claims raised by the authors inadmissible, it proceeds with its consideration on the merits.

Consideration of the merits

8.1 The Human Rights Committee has considered the present communication in light of all the information made available to it by the parties, as provided in article 5, paragraph 1, of the Optional Protocol.

8.2 The Committee relies upon the following facts on the basis of which it will consider the authors' claims. A statutory-based scheme for the early release of prisoners was set up pursuant to the Multi-Party Agreement of the GFA and was implemented in the Criminal Justice (Release of Prisoners) Act, 1998. The Multi-Party Agreement is a political agreement. It is undisputed that neither the GFA nor the Criminal Justice (Release of Prisoners) Act, 1998, which implemented the Agreement, conferred a general right of release on prisoners. It is also undisputed that, although the 1998 Act does not purport to confer any additional power of commutation or remission of sentence on the Minister, the Act empowers him/her to deem a person to be a "qualifying prisoner". The criteria upon which the Minister was empowered to specify prisoners as "qualifying" were not incorporated in the Act but, and this is uncontested by the State party, it appears that certain criteria were established by the Minister to assess whether a prisoner should be so specified. From the State party's point of view, the criteria established and applied by the Minister were not relevant to the circumstances of this case, as it was never intended to consider the authors under the scheme.

8.3 The authors claim that the Minister for Justice, Equality and Law Reform's refusal to specify them as "qualifying prisoners" under the scheme for the early release of prisoners, pursuant to the GFA, was arbitrary and discriminatory. The Committee considers that under article 26, States parties are bound, in their legislative, judicial and executive action, to ensure that everyone is treated equally and without discrimination based on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status any of the grounds enumerated in this provision. It recalls its constant jurisprudence that not every distinction constitutes discrimination, in violation of article 26, but that distinctions must be justified on reasonable and objective grounds, in pursuit of an aim that is legitimate under the Covenant.[13] As regards the prohibition of discrimination, the Committee notes that the distinction made by the State party between the authors and those prisoners who had been included in the early release scheme is not based on any of the grounds listed in article 26. In particular, the authors were not excluded because of their political opinions. However, article 26 not only prohibits discrimination but also embodies the guarantee of equality before the law and equal protection of the law.

8.4 The Committee observes that it was pursuant to the Multi-party Agreement - a political agreement - that the Release of Prisoners' Scheme was enacted, and considers that it cannot examine this case outside its political context. It notes that the early release scheme did not create any entitlement to early release but left it to the discretion of the relevant authorities to decide, in the individual case, whether the person concerned should benefit from the scheme. It considers that this discretion is very wide and that, therefore, the mere fact that other prisoners in similar circumstances were released does not automatically amount to a violation of article 26. The Committee notes that the State party justifies the exclusion of the authors (and others involved in the incident in which Garda McCabe was murdered) from the scheme, by reason of the combined circumstances of the incident in question, its timing (in the context of a breach of a cease-fire), its brutality, and the need to ensure public support for the GFA. In 1996 when the incident occurred, the government assessed the impact of the incident as exceptional. For this reason, it considered that all those involved would be excluded from any subsequent agreement on the release of prisoners. This decision was taken after the incident in question but before the conviction of those responsible, and thus, focused on the impact of the incident itself rather than on the individuals involved. All those responsible were made aware, from the outset, that if they were convicted of having had any involvement in the incident, they would be excluded from the scheme. The Committee also notes that, apparently, others convicted of killing Gardai who benefited from the early release scheme had already served long sentences (see para. 2.10). The Committee considers that it is not in a position to substitute the State party's assessment of facts with its own views, particularly with respect to a decision that was made nearly ten years ago, in a political context, and leading up to a peace agreement. It finds that the material in front of it does not disclose arbitrariness and concludes that the authors' rights under article 26 to equality before the law and to the equal protection of the law have not been violated.

8.5 As regards the authors' claims that their continuing detention violated article 9 paragraph 1 of the Covenant, the Committee finds that in light of the finding above (para. 8.4), such detention did not amount to arbitrary detention.

8.6 Finally, the authors claim that they were denied an effective remedy, under article 2, paragraph 3 and suffered from a violation of article 14, paragraph 1 of the Covenant, because the State party's courts failed to protect them against discrimination in the operation of the early release scheme, there was no avenue of redress after the Supreme Court had rejected their appeal on clearly erroneous grounds, and failed to afford them fair procedures during the hearing of their appeal and the consideration of their application to set aside the Court's decision. The Committee notes that the authors had full access to the courts of their country, and that the Supreme Court considered this matter on two occasions. Although it would now appear that the Court's decision was based on erroneous facts, on reviewing its decision on 1 April 2004, the Supreme Court found that the parties had agreed upon the facts in issue, thereby sustaining its prior decision. Thus, the Committee concludes that these decisions do not reveal any arbitrariness, and therefore finds that articles 2 and 14 of the Covenant have not been violated in the present case.

9. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts before it do not reveal a breach of any articles of the Covenant.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the Committee's annual report to the General Assembly.]

Notes

[1] In the "prisoners" section of the GFA, it was stated that " ... the intention would be that should the circumstances allow it, any qualifying prisoners who remained in custody two years after the commencement of the scheme would be released at that point".

[2] According to the 1998 Act, "qualifying prisoners" shall be construed in accordance with section 3 (2) of this Act. Section 3 (2) states, "The Minister shall from time to time, as he or she considers appropriate, request the Commission to give advice with respect to the exercise, by reference to the relevant provisions, of any power referred to in subsection (1) of this section in relation to persons specified by the Minister to be qualifying prisoners for the purposes of those provisions (in this Act referred to as "qualifying prisoners") and the Commission shall comply with such a request."

"Relevant provisions" mean "those provisions of the Agreement reached in the Multi-Party Talks which appear under the heading "Prisoners" in that Agreement … "

Under the "prisoners" heading in the GFA, it stated inter alia that the prisoners must have been convicted of an offence similar to a scheduled offence in Northern Ireland and must not be affiliated to organizations that are not maintaining a complete and unequivocal cease-fire.

[3] The death penalty was retained in Ireland until 1990 for the murder of police officers on duty, known as "capital murder" but all such sentences were commuted to 40 years imprisonment without remission. In 1990 the death penalty was abolished for all offences but a mandatory minimum sentence of 40 years was prescribed for capital murder.

[4] *Doherty v. Governor of Portlaoise Prison* [2002] 2 IR 252.

[5] 452 US 458.

[6] *Von Alphen v. the Netherlands*, case No. 305/1988, Views adopted on 23 July 1990.

[7] The State party refers to the case of *B.D.B. v. The Netherlands*, case No. 273/1988, decision of 30 March 1989.

[8] Case No. 819/1998, Views adopted on 4 April 2001.

[9] *Desmond O'Hare v. the Justice Minister, Equality and Law Reform and Ireland and the Attorney-General*, No. 513JR/2000, *Henry Doherty v. the Governor of Portlaoise Prison and others*, [2000] IEHC107 and [2002] IESC8, *O'Shea v. Ireland, the Government and the Attorney-General*, 418JR/1999.

[10] The authors refer to the case of *Grice v. The United Kingdom*, application No. 22564/93, 14 April 1994, *Webster v. The United Kingdom*, application No. 12118/86, 4 March 1987, and *Weeks v. The United Kingdom* (9787) [1987] ECHR.

[11] The authors refer to *Grice v. The United Kingdom, supra, Weeks v. The United Kingdom, supra, R v. Parole Board ex parte Smith* and *R v. Parole Board ex parte West* [2005] UKHL1, 27 January 2005, where the United Kingdom House of Lords, applying article 5.4 of the European Convention, held that prisoners contesting revocation of their release on licence were entitled to fair procedures which could, where appropriate, include an oral hearing.

[12] Supra, Note 18.

[13] *Love v. Australia*, case No. 24/1977, Views adopted on 30 July 1982, *Tesdale v. Trinidad and Tobago*, case No. 677/1996, Views adopted on 1 April 2002, *Kavanagh v. Ireland*, supra.

APPENDIX

Dissenting opinion by Committee members Hipólito Solari-Yrigoyen, Mr. Edwin Johnson and Mr. Rafael Rivas Posada

I disagree with the majority view in the following particulars:

1. In regarding the Good Friday Agreement as a "political agreement" which it "cannot examine … outside its political context", the Committee gives undue weight to the State party's claim that it based its decision not to include the authors in the early release scheme on the exceptional impact and repercussions of the offence [of which they were convicted] on public opinion. The State party asserts that the offences in question "caused outrage", that the Government did not believe the Irish people would tolerate the early release of the authors, and that when the Prime Minister announced in Parliament that he would consider their early release, his statement provoked "strong public criticism".

2. It seems perverse that, according to the majority position during the discussion of the case in its political context, the authors' political opinions are to be described as real or "alleged" when the State party has explicitly acknowledged that high-ranking members of the Provisional IRA were involved, and when unchallenged evidence made available to the Committee shows that the offences of which the authors were found guilty were committed in the name of the Provisional Irish Republican Army, that the prison authorities and the Department of Justice acknowledged that the authors belonged to the Provisional IRA, and that as such the authors were confined in a special wing of the prison intended for IRA members. The Supreme Court also found that the authors were undeniably members of the Provisional IRA. There is nothing "alleged" about the authors' political opinions.

3. Whether the Good Friday Agreement was political or not, the crucial issue for the Committee should be to ascertain whether the exclusion of the authors from the early release scheme was consistent with article 26 of the Covenant, which calls for equality before the law and prohibits discrimination on the grounds which it specifies. Even if the early release scheme left it to the discretion of the authorities to include or exclude a particular individual, a decision to exclude someone ought to be based on fair and reasonable criteria - something which the State party has not so much as attempted to do.

4. The authors point out that the State party included under the scheme people guilty of crimes as serious as or more serious than those which they committed, such as killing policemen, a crime attracting the death penalty until 1990 and punishable thereafter by a mandatory minimum 40-year prison sentence. They also report that a Department of Justice document made available to them which discussed the prison terms that should be served by prisoners found guilty after 10 April 1998 of crimes committed before the Good Friday Agreement (the authors' case) expressly excluded them. The State party has confirmed that the authors were repeatedly excluded from the early release scheme and that "on successive occasions members of the … Government made public pronouncements to this effect" (para. 4.2). Hence the State party has deliberately treated the authors differently from other people convicted of crimes similar to or more serious than those the authors committed.

5. Given that one of the authors was convicted of manslaughter (in the *Garda McCabe* case) and the other of conspiracy to commit robbery although he had not even been at the scene of the

crime, one must conclude that the State party has not shown that its decision to exclude the authors from the early release scheme was based on fair and reasonable grounds. The decision was based on political and other considerations unacceptable under the Covenant such as the potential impact of the authors' early release on public opinion. As the Committee has pointed out in general comment 18, article 26 of the Covenant does not merely duplicate the guarantee offered by article 2 but provides an autonomous right prohibiting discrimination in law or in fact in any field regulated and protected by public authorities.

6. I therefore consider that the authors' right under article 26 of the Covenant to equality before the law and equal protection of the law without discrimination of any kind has been violated.

(*Signed*): Hipólito Solari-Yrigoyen

(*Signed*): Edwin Johnson

(*Signed*): Rafael Rivas Posada

[Done in English, French and Spanish, the Spanish text being the original version. Subsequently to be issued in Arabic, Chinese and Russian as part of the Committee's annual report to the General Assembly.]

Concurring opinion of Committee member Ms. Ruth Wedgwood

The Committee has properly concluded that the State party did not act in an arbitrary fashion when it declined to release the two authors from prison under the Good Friday Agreement. The authors were involved in a robbery which led to the shooting death of an Irish police officer in June 1996. This violent crime contributed to the breach of a two-year ceasefire declared in August 1994, and helped to bring more than another year of fighting in a bitter civil conflict. Any alleged misapprehension of the facts of the authors' case by the Supreme Court of Ireland was cured in a petition for consideration and government affidavit submitted to the Court. See Views of the Committee, paragraph 2.16 supra. In full possession of these facts, the Supreme Court reaffirmed its prior holding.

There is one cautionary note that properly attends our consideration of this case. Article 26 of the Covenant provides that all persons are equal before the law, and are entitled to equal protection of the law. Article 26 also forbids discrimination on "any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth, or other status." But Article 26 does not allow the Committee to sit as an administrative court, reviewing every government decision, in the same fashion as a national administrative tribunal. This is a point especially important in the management of our decisional capacity under the First Optional Protocol.

The authors' complaint alleges that the Justice Minister of Ireland failed to write them with reasons for their exclusion from "qualifying prisoners" for potential release. They also ask the Committee to disallow the Minister's underlying reasons as arbitrary and inadequate, because other prisoners who were released had allegedly committed crimes as equally grave as their own. But the Supreme Court of Ireland noted that the Good Friday Agreement had not been incorporated into Irish law and was not designed to confer specific rights on individuals. In a great many countries, pardon authority remains a discretionary exercise, for which the Executive is not required to give reasons. There is no allegation here that any of the specific characteristics named in Article 26 affected the government's decision, nor any other identity-related characteristic. Thus, there is no apparent basis for the authors' claim under Article 26.

(*Signed*): Ruth Wedgwood

[Done in English, French and Spanish, the English text being the original version. Subsequently to be issued in Arabic, Chinese and Russian as part of the Committee's annual report to the General Assembly.]

Individual opinion by Committee members Mr. Rajsoomer Lallah and Ms. Christine Chanet

1. I am unable to share the majority view that Article 26 has not been violated. In my view, those provisions of the article prescribing the fundamental principles of equality before the law and the equal protection of the law have been violated.

2. While it is true to say that the actual exercise of power to release prisoners earlier than their term of imprisonment was contained in existing law which applied generally to all prisoners, nevertheless the 1998 Act which was designed to implement the GFA, in its specific application to prisoners, created a special scheme and the special mechanism of an advisory Commission to consider the early release of "qualifying prisoners" (*vide paragraphs 2.6 and 2.7 of the Committee Views for the background and meaning of this term*).

3. The 1998 Act thus created, for the purpose of the exercise of the early release provisions, a special category of prisoners a list of whom the relevant Minister was statutorily empowered to refer to the Commission for advice.

4. I open a parenthesis here to observe that the question whether the Minister would or would not be bound by that advice is not relevant, though it could reasonably be assumed that such Commissions are created for a genuine purpose, are not otiose statutory creations and are not unlike Commissions on the Prerogative of Mercy in a number of modern Constitutions by whose advice the Executive is bound. Clearly the purpose is precisely to shield decisions affecting the liberty of individuals from political expediency and to ensure, in this regard, the observance of the principles of equality and equal protection of the law.

5. Be that as it may and at a minimum, the 1998 Act created a special category of "qualifying prisoners", as distinct from the general category of prisoners, to be entitled to inclusion in the Ministerial list and to have their cases considered by the statutory Commission. While article 26 permits, in principle, different treatment between several claimants on reasonable and objective criteria, such criteria cease to be reasonable and objective when they are based on essentially political considerations expressly prohibited by article 26, whether in the enactment of laws or in their implementation or else in their judicial adjudication. The authors were thus deprived of their entitlement to inclusion in the list in violation of their article 26 right, as "qualifying prisoners", to equality of treatment and the equal protection of the law.

(*Signed*): Rajsoomer Lallah

(*Signed*): Christine Chanet

[Done in English, French and Spanish, the English text being the original version. Subsequently to be issued in Arabic, Chinese and Russian as part of the Committee's annual report to the General Assembly.]

UU. Communication No. 1421/2005, *Larrañaga v. The Philippines*

(Views adopted on 24 July 2006, eighty-seventh session)*

Submitted by:	Francisco Juan Larrañaga (represented by counsel, Ms. Sarah de Mas and Mr. Faisal Saifee)
Alleged victim:	The author
State party:	The Philippines
Date of communication:	15 August 2005 (initial submission)
Subject matter:	Death sentence following unfair trial
Procedural issues:	Interim measures
Substantive issues:	Mandatory imposition of the death penalty, reintroduction of the death penalty, arbitrary deprivation of life, impartiality of the tribunal, failure to be presumed innocent, inadequate time and facilities to prepare defence, right to examine witnesses, right to choose counsel of own choosing, heavier sentence imposed on appeal, right to have sentence and conviction reviewed by a higher tribunal, right to be tried without undue delay
Articles of the Covenant:	6, 7, 9, and 14
Article of the Optional Protocol:	None

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 24 July 2006,

Having concluded its consideration of communication No. 1421/2005, submitted to the Human Rights Committee on behalf of Francisco Juan Larrañaga under the Optional Protocol to the International Covenant on Civil and Political Rights,

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* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Nisuke Ando, Mr. Prafullachandra Natwarlal Bhagwati, Mr. Alfredo Castillero Hoyos, Ms. Christine Chanet, Mr. Maurice Glèlè Ahanhanzo, Mr. Edwin Johnson, Mr. Walter Kälin, Mr. Ahmed Tawfik Khalil, Mr. Rajsoomer Lallah, Mr. Michael O'Flaherty, Ms. Elisabeth Palm, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Ivan Shearer, Mr. Hipólito Solari-Yrigoyen, Ms. Ruth Wedgwood and Mr. Roman Wieruszewski.

The texts of two individual opinions signed by Committee members, Mr. Nisuke Ando and Ms. Ruth Wedgwood are appended to the present document.

Having taken into account all written information made available to it by the author of the communication, and the State party,

Adopts the following:

Views under article 5, paragraph 4, of the Optional Protocol

1.1 The author of the communication, dated 15 August 2005, is Francisco Juan Larrañaga, a Filipino and Spanish national, born on 27 December 1977. He is sentenced to death and currently imprisoned at New Bilibid Prison, in the Philippines. He claims to be a victim of violations of article 6; article 7; article 9, and article 14 of the Covenant by the Philippines. The Optional Protocol entered into force for the State party on 22 November 1989. The author is represented by counsel, Ms. Sarah de Mas and Mr. Faisal Saifee.

1.2 In accordance with rule 92 of the Committee's Rules of Procedure, the Committee, acting through its Special Rapporteur on new communications, requested the State party on 19 August 2005 not to carry out the death sentence against the author so as to enable the Committee to examine his complaint

The facts as submitted by the author

2.1 On 5 May 1999, the author, along with six co-defendants, was found guilty of kidnapping and serious illegal detention of Jacqueline Chiong by the Special Heinous Crimes Court in Cebu City and was sentenced to *reclusion perpetua*. On 3 February 2004, the Supreme Court of the Philippines found the author also guilty of kidnapping and serious illegal detention with homicide and rape of Marijoy Chiong and sentenced him to death. He was also sentenced to *reclusion perpetua* for the simple kidnapping and serious illegal detention of Jacqueline Chiong.

2.2 According to the prosecution, the author, along with seven other men, kidnapped Marijoy and Jacqueline Chiong in Cebu City on 16 July 1997. On the same day, the two women were allegedly raped. Marijoy Chiong was then pushed down into a ravine, while Jacqueline Chiong was beaten. Jacqueline Chiong's body remains missing.

2.3 According to the author, he travelled from Cebu City to Quezon City on 8 June 1997 to pursue a Diploma at the Centre for culinary arts in Quezon City. On 16 July 1997, he was taking examinations during the entire day and then went to a restaurant in the evening. He stayed with friends until the next morning. On 17 July 1997, he took another examination before taking a plane back to Cebu City at 5 p.m.

2.4 On 15 September 1997, the police tried to arrest the author without a warrant. On 17 September 1997, author's counsel made a request to the prosecutor that the author be given a preliminary investigation and that he be granted a period of 20 days to file the defence affidavit. The prosecutor denied this request, arguing that the author was entitled only to an inquest investigation. On 19 September 1997, author's counsel appealed to the Court of Appeals to prevent the filing of criminal information against the author. However, criminal charges had already been filed on 17 September 1997 with the Regional Trial Court of Cebu City. On 22 September 1997, counsel filed a petition with the Court of Appeals requesting that the Regional Trial Court of Cebu City prevent the author's arrest. Nevertheless, he was arrested on that day with a warrant issued by that court. He remains incarcerated ever since. Another petition was filed in the Court of Appeals against his arrest and dismissed on 25 September 1997. This decision was appealed to the Supreme Court. Despite this pending appeal, the author was brought before a judge on 14 October 1997. He did not enter a plea and the judge thus entered a plea of not guilty to two counts of kidnapping with serious illegal detention. On 16 October 1997, the Supreme Court temporarily restrained this judge from proceeding with the case to prevent the issues before the court from becoming moot. On 27 October 1997, the Supreme Court set aside the inquest investigation and held that the author was entitled to a proper preliminary investigation.

2.5 The trial began on 12 August 1998 in the Special Heinous Crimes Court in Cebu City. The prosecution presented its first and main witness, the defendant Davidson Valiente Rusia, who was promised immunity from prosecution if he told the truth. The prosecution witness was induced by the judge to testify against the author and his co-defendants. This cross-examination took place on 13 and 17 August 1998. During the hearings, the witness admitted for the first time that he had raped Marijoy Chiong. However, on the second day, the cross-examination was cut short just after the witness admitted that he lied about his previous convictions, which should have disentitled him from immunity, and claimed to feel dizzy. The witness was brought back to court on 20 August 1998, but his cross-examination was cut short again in the light of allegations that he had been bribed. On the same day, the trial judge thus decided that, in view of time constraints and to avoid the possibility of the witness being killed, kidnapped, threatened, or bribed, further cross-examination would be terminated at 5 pm that day. In response, author's counsel refused to participate in the trial and asked the trial judge to recuse himself. On 24 August 1998, he was summarily found guilty of contempt of court, arrested and imprisoned. The trial was suspended.

2.6 The author gave written consent to the withdrawal of his counsel and requested three weeks to hire a new counsel. On 31 August 1998, the court refused to adjourn the trial any further, and offered the defendants the opportunity to rehire their counsel, who were in prison, as the trial was due to restart on 3 September 1998. On 2 September 1998, the court ordered the Public Attorney's Office to assign to the court a team of public attorneys who would act temporarily as defence counsel until the defendants hired new counsel. On 3 September 1998, the trial resumed and the court appointed three attorneys of the Public Attorney's Office as defence counsel for all the defendants who were without legal counsel, including the author. The author reiterated that he wanted to choose his own counsel.

2.7 From 3 to 18 September 1998, 25 prosecution witnesses testified while the author was represented by counsel from the Public Attorney's Office. By Order of 8 September 1998, the court deferred the cross-examination of several other prosecution witnesses in view of the defendants' insistence that the lawyer whom they had yet to choose would conduct the cross-examination. On 24 September 1998, the author's newly appointed counsel appeared in the proceedings and asked that the prosecution witnesses be re-examined. The court refused. It also refused to grant the author's new counsel an adjournment of either 20 or 30 days to acquaint himself with the case file and effectively conduct the cross-examination of the witnesses. Instead, the court ordered that the cross-examination would start on 30 September 1998, because the trial should be terminated within 60 days. From 1 to 12 October 1998, author's counsel cross-examined again the main prosecution witness Rusia. However, in response to a motion from the prosecution, he was discharged as a witness on 12 November 1998 and was granted immunity from prosecution. By Order of 8 October 1998, the trial court had given the new counsel only four days to decide whether to cross-examine the prosecution witnesses who had testified while the author was assisted by a counsel from the Public Attorney's Office. On 12 October 1998, counsel refused, in protest, to cross-examine these prosecution witnesses. By Order of 14 October 1998, the trial court decided that all the defendants had waived their right to cross-examine prosecution witnesses.

2.8 On 23 November 1998, 14 witnesses testified in favour of the author and confirmed that he was in Quezon City immediately before, during and after the alleged crime committed in Cebu City, more than 500 kilometres away. Several pieces of evidence were presented to the court to the same effect. On 9 December 1998, the trial judge refused to hear other witnesses on the ground that their testimony would be substantially the same as the author's other witnesses. On 6, 12, 18, 20, and 25 January 1999, he refused to hear evidence from other defence witnesses on the ground that the evidence was "irrelevant and immaterial", whereas the author believes that it was of crucial importance to the defence of alibi. The transcripts reveal that, for example, the judge refused to hear a defence witness on 12 January 1999, since it would not prove that it was "physically impossible" for the author to be in Cebu City at the time of the commission of the crimes. On 1 February 1999, the author was not allowed to testify either. On 2 February 1999, the trial court issued an Order under which any further evidence on the author's alibi would only be cumulative or superfluous because he had already presented 14 witnesses.
On 3 February 1999, the trial court confirmed its refusal to allow the author to testify.

2.9 On 5 May 1999, the Special Heinous Crimes Court found the author guilty of the kidnapping and serious illegal detention of Jacqueline Chiong and sentenced him to *reclusion perpetua*. It decided that there was insufficient evidence to find him guilty of the kidnapping and serious illegal detention with homicide and rape of Marijoy Chiong. On 10 May 2000, the author appealed to the Supreme Court. This appeal raised four issues: (i) violations of rights of due process, including the right to choose counsel, the right to effective counsel, the refusal to hear the author's testimony, the refusal to allow the author to call defence witnesses, and the denial of an impartial trial through the actions of the presiding judge; (ii) improper handling of the main prosecution witness's evidence; (iii) insufficient prosecution evidence to convict him; and (iv) inappropriate standard of proof required for presenting alibi evidence.

2.10 While the Supreme Court has the power to conduct hearings under the Rules of Court, it followed its usual practice of not hearing the testimony of any witnesses during the review process, relying solely upon the lower court's appreciation of the evidence. On 3 February 2004, it found the author guilty not only of the kidnapping and serious illegal detention of Jacqueline Chiong, but also of the complex crime of kidnapping and serious illegal detention with homicide and rape of Marijoy Chiong. The author was sentenced to death by lethal injection. A motion for reconsideration was lodged with the Supreme Court on 2 March 2004; this was rejected on 21 July 2005.

The complaint

3.1 The author alleges a violation of article 6 of the Covenant because the State party reintroduced the death penalty after abolishing it.[1] He claims that the death penalty was abolished when the new Constitution came into force on 2 February 1987 (article 3 (19) (1)). On 13 December 1993, Congress adopted the Republic Act No. 7659 which allowed the death penalty to be imposed again for a number of crimes. The author recalls that, while the majority in the Supreme Court has held that new laws authorising capital punishment were not unconstitutional, a minority stated that "the Constitution did not merely suspend the imposition of the death penalty, but in fact completely abolished it from the statute books".[2] The minority view was reiterated when deciding the author's case.

3.2 The author alleges a violation of article 6 on the ground that the Supreme Court automatically sentenced him to capital punishment under article 267 of the Revised Penal Code. Therefore, it did not take into account any possible mitigating circumstances which may have benefited him, such as his relative youth. He argues that mandatory death penalty violates his right not to be arbitrarily deprived of his life.[3]

3.3 The author alleges a violation of article 14, paragraph 2, and that the evaluation of facts and evidence by the Special Heinous Crimes Court and the Supreme Court were manifestly arbitrary and amounted to a denial of justice, in violation of his right to be presumed innocent until proved guilty.[4] Firstly, he claims that there was insufficient evidence of homicide or rape. He recalls that the trial court found that there was insufficient evidence of homicide or rape of either Marijoy or Jacqueline Chiong, and that the main prosecution witness did not even implicate the author in the homicide of Marijoy Chiong. Serious doubts were expressed by a forensic pathologist as to the evidence provided in court. However, the Supreme Court found the author guilty of homicide and rape of Marijoy Chiong by relying solely on the evidence before the trial court. Secondly, the prosecution was based on the testimony of one witness who had been charged with the same crimes. This witness gave evidence against the author in return for his own release and acquittal.[5] He recalls that the trial judge accepted that the witness had lied, but considered that his testimony was not entirely false. The Supreme Court did not consider the witness's motives for testifying against his co-accused, nor did it assess the weight attributed to his testimony. Finally, the author argues that both the trial court and the Supreme Court incorrectly shifted the burden of proof on to him to prove that it was "physically impossible" for him to have been at the scene of the crime. The sole evidence against the author was given by prosecution witnesses identifying him, whereas he had to provide "clear and convincing evidence" that he was not at the scene of the crime. He thus argues that he was not presumed innocent because of the reversal of the burden of proof.

3.4 The author alleges a violation of article 14, paragraph 1,[6] and article 14, paragraph 2,[7] because both the trial court and the Supreme Court were subject to outside pressure from powerful social groups, especially the Chinese-Filipino community, of which the victims are members and which argued for the execution of the defendants. The aunt of the victims was the secretary of President Estrada who called for the execution of the author after the judgement of the trial court. The defendants were subject to many negative media reports before judgement which led the judges to have preconceptions about the case. Finally, the author finds evidence of these preconceptions in the judgements.

3.5 The author alleges violations of article 14 because the convictions and sentences imposed by the Special Heinous Crimes Court were premised on serious procedural irregularities which either individually or cumulatively constitute violations of this provision.[8] Firstly, he was prevented from testifying at his own trial in violation of article 14, paragraphs 1,[9] 3 (d)[10] and 3 (e).[11] He argues that he had the right to present his case in the best manner possible, which means in practice the right of the accused to counter the prosecution's allegations and to provide evidence of his own innocence. In its judgement, the Supreme Court merely noted the trial court's refusal to allow the author to testify.

3.6 Secondly, the author argues that there was no equality to call and examine witnesses in violation of article 14, paragraph 3 (e).[12] The trial judge refused to hear several defence witnesses and effectively withheld evidence indicating that another person or persons may have committed the crimes of which the author was accused.[13] Indeed, the author recalls that, on 25 January 1999, the trial court refused to issue a subpoena to hear the testimony of the director of the National Bureau of Investigation for Cebu, because the prosecution had questioned the relevance of such testimony. In fact, the director's testimony would have established that there were initially twenty-five suspects for the kidnapping and that the author was not one of them. The evidence was presented to the Supreme Court, but the Court determined that it was immaterial in its judgement of 3 February 2004.

3.7 Thirdly, the author argues that his right to cross-examine prosecution witnesses was unfairly restricted in violation of article 14, paragraph 3 (e). He recalls that the trial judge was obstructive when author's counsel sought to cross-examine the main prosecution witness (see para. 2.5 above). While his new counsel refused to cross-examine the prosecution witnesses, the author argues that this decision not to cross-examine was not a tactical consideration, but a decision not to accede to an unfair process, and that he should not be penalised for his insistence on the right to cross-examine prosecution witnesses in a fair way. He adds that his new counsel was unable to cross-examine the witnesses because he had not heard the examination-in-chief of the same witnesses. If he had cross-examined the witnesses, he would have been in an unequal position vis-à-vis the prosecution, which would have heard both the examination-in-chief and the cross-examination of the witnesses. The Supreme Court failed to correct these errors.

3.8 Fourthly, the author argues that bearing in mind the irreversible nature of the death penalty and the ineffectiveness of court-appointed lawyers in these cases,[14] his counsel did not have sufficient time to prepare the defence, in violation of article 14, paragraph 3 (b),[15] and that he could not choose an effective counsel, in violation of article 14, paragraph 3 (d).[16] The decision to send his counsel to jail for contempt of court constitutes a violation of the Covenant.[17] He adds that the refusal to grant a reasonable adjournment to find a new counsel was also unlawful,[18] and recalls that on 2 September 1998, the trial judge ordered a lawyer from the Public Attorney's Office to represent the author despite his insistence on an adjournment to seek his own counsel and the fact that he had the means to do so.[19] As a result, between 3 and 23 September 1998, the author was represented by a lawyer from the Public Attorney's Office who had had less than a day to prepare his defence and was denied any further time to prepare in violation of the Covenant.[20] During that period, 25 prosecution witnesses gave evidence and the author's appointed counsel did not object to any of the evidence. Lawyers from the Public Attorney's Office even complained that they had a conflict of interest since they had at one stage represented the main prosecution witness, who was one of the defendants, and were now representing the other defendants. The author argues that his new counsel should have been given sufficient time to acquaint himself with the case file. While these issues were raised on appeal, the Supreme Court failed to correct the irregularities which took place during the trial.

3.9 Fifthly, the author argues that he was not tried by an independent and impartial tribunal in violation of article 14, paragraph 1. He recalls that the trial judge led the main prosecution witness to testify against the author and that his counsel objected to this on several occasions. The trial judge obstructed the cross-examination of this witness on 13 August 1998, and made disrespectful remarks about the defence witnesses. In addition, the trial judge was the same judge who had evaluated the preliminary charges against the author on 14 October 1997; he should thus not have been involved in the trial.[21] Again, the issue was raised before the Supreme Court which failed to respond adequately.

3.10 The author alleges violations of article 6 (2) and article 14 because the Supreme Court failed to correct any of the irregularities of the proceedings before the lower court.[22] Firstly, the Supreme Court judges harboured preconceptions about the trial, in violation of article 14 (1).[23] He notes that two judges of the Court of Appeals who had evaluated the preliminary charges against the author in 1997 sat on the Supreme Court when deciding the author's case on 3 February 2004 and dismissing his motion for reconsideration on 21 July 2005. He argues that they did so in violation of Rule 137 of the Philippine Rules of Court. Another judge, whose wife was the great-aunt of the victims, also sat on the Supreme Court deciding the author's case on 3 February 2004 and dismissing the motion for reconsideration on 21 July 2005. Secondly, the Supreme Court violated the principle of *ex officio reformatio in peius* enshrined in article 14 (1)[24] and his right to appeal as defined in article 14(5). He recalls that the Supreme Court found him guilty of the homicide and rape of Marijoy Chiong and sentenced him to death.[25] Thirdly, the author argues that the Supreme Court violated his right to a public hearing as protected by article 14,[26] and in particular 14 (1),[27] 6 (2) and 14 (2), and 14 (5),[28] and his right to be present during the hearing as protected by article 14, paragraph 3 (d).[29] He recalls that the Supreme Court did not hear oral testimony and that he was prevented from attending his appeal. There was no justification for refusing him an oral hearing,[30] especially since judgement on appeal was given four years and nine months later and expedition was therefore not a factor. Finally, the author argues that the Supreme Court violated his right to appeal to a higher tribunal according to law as required by article 14 (5). He notes that he was convicted of homicide and rape and sentenced to death for the first time at last instance,[31] and could not appeal to a higher tribunal.[32] He also notes that his motion for reconsideration was considered on 21 July 2005 by 12 of the same judges who had sentenced him to death. He therefore argues that resolution on the motion cannot be said to have been impartial.

3.11 The author alleges violations of articles 9 (3), 14 (3) (c) and 14 (5), because there were undue delays in the proceedings. The proceedings as a whole were conducted with undue delay,[33] as were the individual stages. The author recalls that information charging him with kidnap and serious illegal detention was filed on 17 September 1997, that his trial began eleven months later on 12 August 1998, and that judgement was delivered one year and eight months after charge, namely on 5 May 1999.[34] He filed his appeal on 10 May 2000 and the Supreme Court decided about three years and nine months later, on 3 February 2004.[35] Accordingly, the delay between charge and the Supreme Court decision was six years and five months. The author filed a motion for reconsideration on 2 March 2004, which was decided on 21 July 2005, after a delay of one year and four months. Therefore, the delay between charge and final decision was seven years and ten months.[36] For the author, such delay is inexcusable since there was little investigation required, and the evidence consisted merely of direct eyewitness testimony and forensic evidence.

3.12 The author alleges a violation of article 6 (1) because the imposition of the death penalty on him at the end of a process in which his fair trial guarantees were violated constitutes an arbitrary deprivation of life.[37]

3.13 The author alleges a violation of article 7, because he is being subject to a prolonged period of detention on death row.[38] He argues that the compelling circumstances are present[39] because of the trauma of other violations of the Covenant and the real risk that he will ultimately be wrongfully executed.[40] Indeed, the fear and uncertainty generated by a death sentence and exacerbated by the undue delay, in circumstances where there is a real risk that the sentence is enforced, give rise to much anguish.[41] The author recalls that he has not caused any of the delay,[42] and argues that there is a real risk of execution because executions continue to be scheduled. Although a moratorium on execution was announced by the President on 17 September 2002, the General Guidelines for recommending executive clemency were amended on 26 June 2003, so that petitions for clemency are not favourably recommended where the person was under the influence of drugs at the time of committal of the crimes. The author recalls that the Supreme Court found that he and his co-defendants had consumed marijuana before committing the alleged crimes.

3.14 The author alleges a violation of article 9 because in the light of the violations detailed above, he has not been deprived of his liberty on such grounds and in accordance with such procedures as are established by law. He argues that his guilt was not proven beyond reasonable doubt, and that he therefore should not have been imprisoned.

3.15 With regard to exhaustion of domestic remedies, the author argues that he has made several complaints on all the violations detailed above. All procedural irregularities encountered in the trial were raised in the appeal before the Supreme Court, while those procedural irregularities encountered before the Supreme Court were raised in the motion for reconsideration. The author argues that a second motion for reconsideration cannot be regarded as an "effective" remedy.[43]

State party's submission on admissibility and merits

4.1 On 3 March 2006, the State party commented on the admissibility and merits of the communication. With regard to the reintroduction of the death penalty, it argues that the death penalty was never abolished by the 1987 Constitution. It recalls that article III, section 19 (1) of the Constitution provides that the death penalty shall not be imposed "unless, for compelling reasons involving heinous crimes, the Congress hereafter provides for it". It refers to the drafting history of the provision in order to demonstrate that the provision was never meant to suppress the right of the State to impose capital punishment. It also refers to a decision of the Supreme Court in which the Court confirmed that there is nothing on article III, section 19 (1) which expressly abolishes the death penalty.[44] It recalls that the imposition of the death penalty for certain crimes is purely a matter for domestic discretion, save for the limitation that it be imposed only for the "most serious crimes". It also recalls that it is not a party to the Second Optional Protocol to the Covenant. While it acknowledges that there is a current trend toward the abolition of the death penalty even for the most serious crimes, it argues that this consideration is insufficient to entirely bar the imposition of the penalty. Accordingly, article 6 should be interpreted to mean that for countries which have abolished the death penalty, it cannot be reinstated, and that for countries which continue to impose it, its abolition is not compulsory, albeit highly encouraged.

4.2 With regard to the allegation that the imposition of death penalty on the author was mandatory, by operation of law, without regard to possible mitigating circumstances, the State party recalls that the Revised Penal Code provides that a person may be convicted for the criminal act of another where, between them, there has been conspiracy or unity of purpose and intention in the commission of the crime. Therefore, the conspirators are held liable for acts committed by each of them and the degree of actual participation of each is immaterial. In the present case, the author and his co-defendants were found by the Supreme Court to have the same objective to kidnap and detain the Chiong sisters. Conspiracy having been established, the author was thus liable for the complex crimes of kidnapping and serious illegal detention with homicide and rape, regardless of who in the group actually pushed Marijoy Chiong into the ravine. With regard to the author's relative youth, the State party notes that while the death penalty cannot be imposed on persons below the age of 18 at the time of the commission of the offence, the author was already 20 when he committed the offences. The State party recalls that "relative youth" is not a mitigating circumstance under domestic penal law, nor in the Committee's jurisprudence.

4.3 The State party recalls that the death penalty was imposed by virtue of article 267 of the Revised Penal Code, but that even then, the imposition of such a sentence took into consideration the circumstances of both the offender and the offence. For capital crimes, the sole mitigating circumstances which can be raised are minority, incomplete justifying circumstances and incomplete exempting circumstances. The State party recalls that one of the author's co-defendants was not sentenced to death on the ground that he was a minor at the time of the commission of the offences. It also recalls that adequate safeguards have been put in place before the imposition of the death penalty, and that these have worked well since 1993. The State party thus argues that "mandatory" is in no way synonymous with "arbitrary", and that there is no violation of article 6 (1). It refers to the Committee's jurisprudence and argues that a death sentence becomes mandatory (understood, in this sense, as arbitrary) when it is imposed without due regard to the circumstances of both the offence and the offender, i.e. by virtue of an undifferentiated murder statute or in disregard of the offender's participation in the commission of the offence.[45] It invokes general comment No. 14/23 of 2 November 1984 on article 6 of the Covenant, in which the Committee elaborates on the notion of arbitrary deprivation of life. It also refers to two individual opinions appended to the Committee's Views in *Carpo*.[46]

4.4 With regard to the allegation that the evaluation of facts was manifestly arbitrary and constituted a denial of justice, the State party argues that the Supreme Court judgement demonstrates that there was clear evidence of homicide and rape. It recalls that a criminal appeal opens up the entire case for review and that to have oral arguments before the Supreme Court is not a matter of right. The Supreme Court carefully assessed the evidence before it and decided to disagree with the trial court's imposition of a life sentence on the author and his co-defendants.

4.5 With regard to the allegation that the prosecution was based on evidence from an accomplice charged with the same crime, the State party recalls that the trial court chose to give credence to his testimony. His testimony was corroborated by disinterested witnesses and compatible with the physical evidence. Both the trial court and the Supreme Court were satisfied with his testimony.

4.6 On the alleged incorrect standard and burden of proof, the State party argues that while it is the duty of the prosecution to prove the allegations in the indictment regarding the elements of the crime, it is the duty of the defence to prove the existence of an alibi, or of justifying or exempting circumstances. As to the motives of the main prosecution witness, the State party recalls that the Supreme Court could not discern any motive on the part of the witnesses why they should testify falsely against the defendants. It concludes that the author was not deprived of his right to be presumed innocent, and that the prosecution was able to satisfy the burden of proving each element of the crimes charged beyond reasonable doubt.

4.7 With regard to the alleged outside pressure on specific judges, the State party notes that the decision of the Supreme Court was rendered by the court as a whole, rather than by specific Justices. In any case, President Estrada was ousted from power in January 2001 and the author was sentenced to death three years later. It is therefore inconceivable that the Supreme Court could have been pressured by an ousted president to convict the author. As to the allegation that both the trial court and the Supreme Court had preconceptions about the case, it argues that this is grounded on speculation and conjectures, and that the judiciary has maintained its independence in the present case.

4.8 With regard to the allegation that fair hearing violations invalidate the decision of the Special Heinous Crimes Court, the State party argues that the author was not prevented from testifying, since the prosecution and the defence agreed to dispense with his testimony, as mentioned in the author's own submission to the Committee. The author cannot thus attribute his failure to testify to the trial court. The State party recalls that domestic courts, subject to the agreement of the prosecution and the defence, may admit in evidence the testimony of a witness even if that person was not placed in the witness stand, and that this is especially true if the testimony to be presented would be merely corroborative, as was in the present case.

4.9 With regard to the allegation that there was no equality of arms to call and examine witnesses, the State party recalls that it is the responsibility of the trial judge to ensure that there is an orderly and expeditious presentation of witnesses and that time was not wasted. Therefore, the trial court may dispense with the testimony of witnesses who would offer the same testimonies given by witnesses who already testified. The State party argues that the circumstances surrounding the trial court's decision to dispense with the testimonies of some of the defence witnesses have been sufficiently justified: such witnesses would only have confirmed what the trial court had already heard.

4.10 With regard to the allegation that the right to cross-examine prosecution witnesses was unfairly restricted, the State party refers to the judgement of the Supreme Court of 3 February 2004 in which the Court denied that the defendants had not been given sufficient opportunity to cross-examine the main prosecution witness during the trial. The Supreme Court also argued that it was the right and duty of the trial court to control the cross-examination of witnesses, both for the purpose of conserving time and protecting the witnesses from prolonged and needless examination.

4.11 With regard to the allegation that counsel did not have sufficient time to prepare the defence and that the author's right to choose effective counsel was violated, the State party recalls that the author's counsel was found guilty of direct contempt of court and hence imprisoned. It explains that direct contempt of court is committed in the presence of or near a court or judge and can be punished summarily without hearing. It distinguishes the Committee's Views in *Fernando* from the present situation because, in that case, the summary conviction for contempt of court had been made without the court citing any reason for it.[47] In response to the allegation that the appointed counsel was inadequately prepared, the State party recalls that the Supreme Court argued that the trial court can appoint a counsel whom it considers competent to enable the trial to proceed. The State party explains that there was no conflict of interest since

Rusia's lawyer, who was also from the Public Attorney's Office, never participated in the prosecution of the author and that his participation was merely to obtain immunity from prosecution for his client. It refers again to the judgement of the Supreme Court, where the Court argued that the decision to grant an adjournment is made at the discretion of the court, and that a refusal is not ordinarily an infringement of the defendant's right to counsel.

4.12 With regard to the allegation that the author's right to an impartial tribunal was violated, the State party argues that the trial judge has the power to ask questions to witnesses, either directly or on cross-examination. There is no basis for the claim of partiality and bias on the part of the trial judge because he was the same judge who had informed the author of the charges against him and asked him to enter his plea. In addition, it was the prosecutors of the Department of Justice, and not the trial judge, who conducted the preliminary investigation of the case.

4.13 With regard to the alleged violations of the Covenant by the Supreme Court, the State party explains that former Chief Justice Davide took no part in the case, as indicated in the notation in the decision next to his name. As for the two other judges referred to by the author, it explains that neither of them presided over the trial court which convicted the author. As to the principle of *ex officio reformatio in peius*, the State party argues that it provides that an appellate court cannot aggravate an earlier verdict without inviting the parties to present their observations. The proceedings before the Supreme Court are adversarial in nature, although the number of pleadings to be filed is at the discretion of the Court. An appeal in a criminal case opens up the entire case for review, and that it becomes the duty of the appellate court to correct any error in the judgement appealed. The author was given ample opportunity to present his arguments and observations before the Supreme Court. As to the right to a public hearing, the State party argues that the right to a public hearing at the appeal stage is not absolute, and that this right applies only to proceedings at first instance. In the present case, the Supreme Court did not consider it necessary to hear the parties orally.[48]

4.14 With regard to the alleged violation of the right to appeal to a higher tribunal according to law, the State party recalls that the author appealed his conviction pronounced by the trial court to the Supreme Court, and argues that his claim has no merit.

4.15 With regard to the allegation of undue delay, the State party argues that the initial delay was due to the fact that the author sought to annul the charges filed against him. During the course of the trial, the author alone presented fourteen witnesses and the defence employed "strategic machinations" to delay the proceedings. It explains that each defendant filed a separate appeal and that the Supreme Court had to first dispose of all collateral issues which had been raised by the author and his co-defendants before it could finally rule on their appeal. It submits that, given the complexity of the case and the fact that the author availed himself of all the remedies available, the courts have acted with all due dispatch. As to the issue of bail, the State party explains that no bail shall be granted where an accused is charged with an offence punishable by death or life imprisonment, and the evidence of guilt is strong.

Author's comments

5.1 On 10 May 2006, the author commented on the State party's submission. He takes note of the recent State party decision to commute all death sentences to life imprisonment, announced on 16 April 2006. However, he remains on death row and has received no documents from the President's Office indicating that his death sentence has been commuted. Moreover, he argues that the President's decision could be overturned by herself or her successor. In any case, he argues that there would still be a violation of the principle of *ex officio reformatio in peius* because life imprisonment constitutes a heavier sentence than *reclusion perpetua* under domestic law.[49]

5.2 The author reiterates that the death penalty was abolished and subsequently reintroduced in the Philippines. He also argues that he was not found guilty of a "most serious crime", since the Supreme Court did not find that the author either committed, was complicit in or even anticipated that Marijoy Chiong would be pushed into a ravine. He submits that on the basis of the facts accepted by the Supreme Court, he could have been convicted only of kidnapping, false imprisonment and rape, which do not constitute "most serious crimes" for the purposes of article 6, paragraph 2.

5.3 The author reiterates that the mandatory imposition of the death sentence constitutes a violation of article 6 of the Covenant. He also argues that it violates the prohibition of cruel and unusual punishment in article 7.

5.4 On the State party's argument that the author had the same objective as his co-defendants to kidnap and detain the Chiong sisters and is thus guilty of conspiracy, he argues that there was no direct evidence of conspiracy and that neither the trial court, nor the Supreme Court found that he had any knowledge of the elements of the offence. He reiterates that there were serious procedural irregularities in his trial. In response to the claim that he dispensed with his testimony, he emphasises that he never agreed to do so and that the trial judge refused to hear it. With regard to the refusal to hear more defence witnesses, he recalls that more than twenty-two prosecution witnesses were allowed by the court to testify and corroborate the evidence given by the main prosecution witness, whereas the author's right to call those witnesses who would have corroborated his version of events was unfairly restricted.

5.5 With regard to the State party's suggestion that the Supreme Court was entitled to increase the penalty imposed by the trial court and even reverse its decision, the author argues that this is mistaken because an appeal to the Supreme Court is primarily for the protection of the accused. Under domestic law, the prosecution is not entitled to appeal an acquittal or sentence imposed by a trial court. Therefore, he insists that the principle of *ex officio reformatio in peius*, which is applied in many countries, was violated.

5.6 With regard to the State party's claim that delays were due to the author, he argues that delays were caused by the lack of judicial discipline, including long and unnecessary annual leave by the presiding judge. As for the claim that delay in the appeal proceedings was partly due to the fact that each defendant filed a separate appeal, he recalls that all appeals were consolidated.

Issues and proceedings before the Committee

Consideration of admissibility

6.1 Before considering any claim contained in a communication, the Human Rights Committee must, in accordance with article 93 of its rules and procedures, decide whether or not it is admissible under the Optional Protocol of the Covenant.

6.2 The Committee has ascertained that the same matter is not being examined under another procedure of international investigation or settlement for the purposes of article 5, paragraph 2 (a), of the Optional Protocol.

6.3 The Committee notes that the State party has not raised any objections to the admissibility of the communication. On the basis of the material before it, it concludes that there are no obstacles to the admissibility of the communication, and declares it admissible.

Consideration of the merits

7.1 The Human Rights Committee has considered the present communication in the light of all the information made available to it, as provided under article 5, paragraph 1, of the Optional Protocol.

7.2 The Committee notes from the judgements of both the trial Court and the Supreme Court, that the author was convicted of kidnapping and serious illegal detention with homicide and rape under article 267 of the Revised Penal Code which provides that "when the victim is killed or dies as a consequence of the detention or is raped [...], the maximum penalty shall be imposed". Thus, the death penalty was imposed automatically by the operation of article 267 of the Revised Penal Code. The Committee recalls its jurisprudence that the automatic and mandatory imposition of the death penalty constitutes an arbitrary deprivation of life, in violation of article 6, paragraph 1, of the Covenant, in circumstances where the death penalty is imposed without any possibility of taking into account the defendant's personal circumstances or the circumstances of the particular offence.[50] It follows that his rights under article 6, paragraph 1, of the Covenant were violated. At the same time, the Committee notes that the State party has adopted Republic Act No. 9346 prohibiting the imposition of death penalty in the Philippines.

7.3 The Committee has noted the arguments of the author that the reintroduction of the death penalty for "heinous crimes", as set out in Republic Act No. 7659, constitutes a violation of article 6 of the Covenant. In the light of the State party's recent repeal of the death penalty, the Committee considers that this claim is no longer a live issue and that it need not consider it in the circumstances of the case.

7.4 With regard to the allegation of a violation of the presumption of innocence, the author has pointed to a number of circumstances which he claims demonstrate that he did not benefit from this presumption. The Committee is cognizant that some States require that a defence of alibi must be raised by the defendant, and that a certain standard of proof must be met before the defence is cognizable. However, here, the trial judge did not show sufficient latitude in permitting the defendant to prove this defence, and in particular, excluded several witnesses offered in the alibi defence. A criminal court may convict a person only when there is no reasonable doubt of his or her guilt, and it is for the prosecution to dispel any such doubt. In the present case, the trial judge put a number of leading questions to the prosecution which tend to justify the conclusion that the author was not presumed innocent until proven guilty. Moreover, incriminating evidence against a person provided by an accomplice charged with the same crime should, in the Committee's opinion, be treated cautiously, particularly where the accomplice was found to lie about his previous criminal convictions, was granted immunity from prosecution, and eventually admitted to raping one of the victims. In the present case, it considers that, despite all the issues mentioned above having been raised by the author, neither the trial court nor the Supreme Court addressed them appropriately. Concerning the public statements made by senior officials portraying the author as guilty, all of which were given very extensive media coverage, the Committee refers to its general comment No. 13 on article 14, where it stated that: "it is, therefore, a duty for all public authorities to refrain from pre-judging the outcome of a trial". In the present case, the Committee considers that the authorities failed to exercise the restraint that article 14, paragraph 2, requires of them, especially taking into account the repeated intimations to the trial judge that the author should be sentenced to death while the trial proceeded. Given the above circumstances, the Committee concludes that the author's trial did not respect the principle of presumption of innocence, in violation of article 14, paragraph 2.[51]

7.5 The Committee notes that the information before it reveals that the author's appointed counsel requested the court to allow him an adjournment, because he was unprepared to defend his client, since he had been appointed on 2 September 1998 and the trial resumed on 3 September 1998. Similarly, the author's chosen counsel also requested the court to allow him an adjournment, because he was unprepared to defend his client, since he made his first appearance in court in this case on 24 September 1998 and the trial resumed on 30 September 1998. The judge refused to grant the requests allegedly because the trial had to be terminated within sixty days. The Committee considers that in a capital case, when counsel for the defendant requests an adjournment because he was not given enough time to acquaint himself with the case, the court must ensure that the defendant is given an opportunity to prepare his defence. In the instant case, both the author's appointed and chosen counsel should have been granted an adjournment. In the circumstances, the Committee finds a violation of article 14, paragraph 3 (b) and (d), of the Covenant.[52]

7.6 As to the author's representation before the trial court, the Committee reiterates that it is axiomatic that legal representation must be made available in capital cases. In the instant case, it is uncontested that counsel was assigned to the author when his previous counsel was found guilty of contempt of court and jailed. From the material before the Committee, it is clear that the author did not wish his court-appointed counsel to represent him and requested an adjournment to hire a new counsel, which he had the means to do. In the circumstances, and bearing in mind that this is a case involving the death penalty, the trial court should have accepted the author's request for a different counsel, even if this entailed an adjournment of the proceedings. To the extent that the author was denied effective representation by counsel of his own choosing and that this issue was raised before the Supreme Court which failed to correct it, the requirements of article 14, paragraph 3 (d), have not been met.[53]

7.7 Concerning the author's claim that there was no equality of arms because his right to cross-examine prosecution witnesses was restricted, the Committee notes that the cross-examination of the main prosecution witness was repeatedly cut short by the trial judge and prematurely terminated to avoid the possibility of harm to the witness (see para. 2.5 above). The Committee also notes that the trial judge refused to hear the remaining defence witnesses. The court refused on the ground that the evidence was "irrelevant and immaterial" and because of time constraints. The Committee reaffirms that it is for the national courts to evaluate facts and evidence in a particular case. However, bearing in mind the seriousness of the charges involved in the present case, the Committee considers that the trial court's denial to hear the remaining defence witnesses without any further justification other than that the evidence was "irrelevant and immaterial" and the time constraints, while, at the same time, the number of witnesses for the prosecution was not similarly restricted, does not meet the requirements of article 14. In the above circumstances, the Committee concludes that there was a violation of article 14, paragraph 3 (e), of the Covenant.

7.8 As to the author's claim that his rights were violated under article 14, in particular paragraphs 1 and 5, because the Supreme Court did not hear the testimony of the witnesses but relied on the first instance interpretation of the evidence provided, the Committee recalls its jurisprudence that a "factual retrial" or "hearing de novo" are not necessary for the purposes of article 14, paragraph 5.[54] However, in the present case, the Committee notes that whereas the author's appeal to the Supreme Court concerned the decision at first instance to find him guilty of kidnapping and serious illegal detention of Jacqueline Chiong, the Supreme Court found him guilty also of kidnapping and serious illegal detention with homicide and rape of Marijoy Chiong, a crime for which he had been acquitted at first instance and for which the prosecutor did not request any change of the sentence. The Supreme Court, which did not find it necessary to hear the parties orally, sentenced the author to death. The Committee considers that, as the Supreme Court in the present case, according to national law, had to examine the case as to the facts and the law, and in particular had to make a full assessment of the question of the author's guilt or innocence, it should have used its power to conduct hearings, as provided under national law, to ensure that the proceedings complied with the requirements of a fair trial as laid down in article 14, paragraph 1.[55] The Committee further notes that the Supreme Court found the author guilty of rape and homicide after he had been acquitted of the same crime at first instance. As a result, the author had no possibility to have the death sentence reviewed by a higher tribunal according to law, as required by article 14, paragraph 5.[56] The Committee concludes that the facts before it disclose a violation of article 14, paragraphs 1 and 5, of the Covenant.

7.9 As to the author's claim that his rights were violated under article 14, paragraphs 1, because the trial court and the Supreme Court were not independent and impartial tribunals, the Committee notes that the trial judge and two Supreme Court judges were involved in the evaluation of the preliminary charges against the author in 1997. In the present case, the involvement of these judges in the preliminary proceedings was such as to allow them to form an opinion on the case prior to the trial and appeal proceedings. This knowledge is necessarily related to the charges against the author and the evaluation of those charges. Therefore, the involvement of these judges in these trial and appeal proceedings is incompatible with the requirement of impartiality in article 14, paragraph 1.

7.10 The Committee has noted the State party's explanations concerning the delay in the trial proceedings against the author. Nevertheless, it finds that the delay was caused by the authorities and that no substantial delay can be attributable to the author. In any case, the fact that the author appealed cannot be held against him. Article 14, paragraph 3 (c), requires that all accused shall be entitled to be tried without undue delay, and the requirement applies equally to the right of review of conviction and sentence guaranteed by article 14, paragraph 5. The Committee considers that a delay of seven years and ten months from the author's arrest in September 1997 to the final decision of the Supreme Court dismissing his motion for reconsideration in July 2005 is incompatible with the requirements of article 14, paragraph 3 (c).[57]

7.11 With regard to the alleged violation of article 7, the Committee considers that to impose a death sentence on a person after an unfair trial is to subject that person wrongfully to the fear that he will be executed. In circumstances where there is a real possibility that the sentence will be enforced, that fear must give rise to considerable anguish. Such anguish cannot be dissociated from the unfairness of the proceedings underlying the sentence. Indeed, as the Committee has previously observed,[58] the imposition of any death sentence that cannot be saved by article 6 would automatically entail a violation of article 7. The Committee therefore concludes that the imposition of the death sentence on the author after the conclusion of proceedings which did not meet the requirements of article 14 of the Covenant amounts to inhuman treatment, in violation of article 7.[59]

7.12 In the light of the finding in 7.11 above, the Committee need not consider whether, since the author's death sentence was affirmed upon conclusion of proceedings which did not meet the requirements of article 14, his rights under article 6 were also violated because of the imposition of the death penalty on him (see para. 3.12 above). Nor does it consider it necessary to address the author's claim under article 9 (see para. 3.14 above).

8. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts before it reveal violations by the State party of article 6, paragraph 1; article 7; and article 14, paragraphs 1, 2, 3 (b), (c), (d), (e), 5, of the Covenant.

9. In accordance with article 2, paragraph 3, of the Covenant, the State party is under an obligation to provide the authors with an effective remedy, including commutation of his death sentence and early consideration for release on parole. The State party is under an obligation to take measures to prevent similar violations in the future.

10. Bearing in mind that, by becoming a party to the Optional Protocol, the State party has recognized the competence of the Committee to determine whether there has been a violation of the Covenant or not and that, pursuant to article 2 of the Covenant, that State party has undertaken to ensure all individuals within its territory or subject to its jurisdiction the rights recognized in the Covenant and to provide an effective and enforceable remedy in case a violation has been established, the Committee wishes to receive from the State party, within 90 days, information about the measures taken to give effect to the Committee's Views. The State party is also requested to publish the Committee's Views.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the Committee's annual report to the General Assembly.]

APPENDIX

Individual opinion by Committee member Mr. Nisuke Ando

1. Reference is made to my individual opinion in case *Carpo et al. v. The Philippines* (case No. 1077/2002).

2. I do not think it proper for the Committee to quote here a judgement of the European Court of Human Rights in footnote 59.

(*Signed*): Nisuke Ando

[Done in English, French and Spanish, the English text being the original version. Subsequently to be issued in Arabic, Chinese and Russian as part of the Committee's annual report to the General Assembly.]

Individual opinion by Committee member Ms. Ruth Wedgwood

There is a lawyer's adage, of grave moral import, that "Death is different". When a capital penalty for a criminal act may be pronounced on a defendant, every trial court and appellate court bears an especially weighty obligation to assure that the adjudicative process has been fair. In the present case, the trial conducted by the Philippines' Special Heinous Crimes Court and the review by the Philippines' Supreme Court involved a number of decisions that were taken without a wise latitude towards the defense.

Nonetheless, the opinion of the Human Rights Committee, in finding violations of the Covenant by the state party, offers a number of sweeping conclusions that are not adequately supported in its explication of the trial record. Were we appointed as the trial judges, we might decide an issue of case management in a different way. But we cannot find a violation of the Covenant on that basis alone. At a minimum, it is our obligation to show how, in the context of a particular trial and its development of the facts, the matter violated a rule of the Covenant.

For example, in paragraph 7.4, the Committee expresses concern about the admission of accomplice testimony and the use of leading questions, in the development of the state's case against the defendant for "kidnapping and serious illegal detention with homicide and rape". See paragraph 7.2. The Committee says that these two issues were not "addressed ... appropriately" and suggests that they contributed to a violation of the presumption of innocence, in violation of Article 14 (2). But leading questions are permitted in many trial systems, and judges are often permitted to ask questions of witnesses. The Philippines judicial system entrusts fact-finding to the judge, and does not provide for a jury, so there is no issue of potentially influencing the views of a jury by the court's intervention. And if the issue is instead styled as sufficiency of the evidence, one is obliged to note the state's uncontested assertion that 25 other prosecution witnesses testified at trial, and physical evidence was offered, and that the witnesses included "disinterested" persons.

The Committee has also concluded, in paragraph 7.5, that the defendant's rights under article 14 (3) (b) and (d) of the Covenant were violated, because various requests for adjournments in the middle of the trial were denied by the trial judge. But the defendant was on trial with six co-defendants, and any delay granted to one defendant would also have affected the speedy trial rights of other defendants. Defendant's initial counsel could have preserved for appeal his complaint about the scope of cross-examination of the major accomplice, instead of refusing to participate further in the trial. The trial court gave the defendant a week to hire new counsel, or to rehire prior counsel, and thereafter appointed public defenders to conduct cross-examination of the prosecution witnesses. The author has not suggested, and the committee has not found, any way in which that cross-examination was inadequate. When the defendant hired new private counsel three weeks later, this counsel requested 20 to 30 days to review the case. But there are very few trial judges who would permit such an extended interruption of a *viva voce* trial, and the author has not offered any account of why such a lengthy period was required in preparing, or any avenue that new counsel failed to pursue in his defense. The judge set a deadline for counsel's decision whether to cross-examine prior prosecution witnesses, but this was a full eighteen days after his appointment. There has been no suggestion why this length of time was inadequate to get ready, such as, inter alia, any absence of written transcripts or other specific impediments.

As another example, the Committee asserts in paragraph 7.9 that the defendant's rights under article 14 (1) to a "competent, independent and impartial tribunal" were violated because "the trial judge and two Supreme Court judges were involved in the evaluation of the preliminary charges against the author in 1997". But many legal systems provide for preliminary proceedings in criminal cases, in which a defendant may contest issues concerning arrest, probable cause, and the rendering of charges for trial. The idea of prejudice in a judge usually refers to some extraneous matter that might bias him against a particular party. It does not refer to his review of the case in prior proceedings. Indeed, some court systems choose to assign any related criminal cases to the same judge, in order to benefit by the judge's familiarity with the issues. It would be radical, indeed, to suggest that because a judge had passed on an issue of bail or remand, or the adequacy of an indictment, that he was thereafter barred from any further participation in the case. There is no suggestion of why, in this particular case, there was any prejudice formed from the earlier judgements undertaken in prior professional review.

Nor has the Committee, in regard to this claim under article 14 (1), attempted to justify the departure from our settled jurisprudence. The Committee's opinion, at paragraph 7.9, footnote 21, cites our prior decision in *Collins v. Jamaica*, communication No. 240/1987, Views adopted on 1 November 1991, and in particular, the concurring views of four members. But it is well to recall that the majority of the committee, in the Collins case, took the opposite view to that adopted by the Committee today. In the Collins case, a Magistrate had heard and granted an application for a change of venue for the conduct of a preliminary hearing in a criminal case, and allegedly remarked "as an aside, that if he were to try the author he would ensure that a capital sentence be pronounced." See *Collins v. Jamaica*, supra, paragraph 2.3. After a hung jury occurred in the initial trial of the case, the matter was set for retrial. The same Magistrate who made prejudicial remarks at the preliminary hearing, was remarkably assigned to hear the second trial of the merits.

Even on these aggravated facts, the Committee stated that "[a]fter careful consideration of the material before it, the Committee cannot conclude that the remark attributed to Justice G. [the magistrate] in the committal proceedings before the Portland Magistrates Court resulted in a denial of justice for [the defendant] during his re-trial ...", noting as well that defense counsel had concluded that "it was preferable to let the trial proceed." See *Collins v. Jamaica*, supra, paragraph 8.3. The separate opinion of four members of the Committee also noticed "[*l*]*es remarques attribuées au Juge G.*", although they noted as well that "*Il appartient à l'Etat partie d'édicter et de faire appliquer les incompatibilités entre les différentes fonctions judiciaires.*"

The second case cited by the Committee is *Karttunen v. Finland*, communication No. 387/1989, decided 23 October 1992, but it offers no greater support. In that criminal case, two lay judges sat on a panel of six, even though the judges were compromised by family relationships to two of the corporate complainants in the case. The state party forthrightly noted the impropriety of their selection as judges in this case, since they had a potential private interest. In this context, the Committee stated, in *Karttunen v. Finland*, paragraph 7.2, that "'Impartiality' of the court implies that judges must not harbour preconceptions about the matter put before them, and that they must not act in ways that promote the interests of one of the parties." The Committee also noted in Karttunen that the judges should have been disqualified under Finnish law itself, and concluded that state law on disqualification should be enforced *proprio moto* by a court. See *Karttunen v. Finland*, paragraph 7.2. But the Committee did not question the majority holding in *Collins v. Jamaica*. It is unclear why, in the instant case, the Committee has now dismissed its own jurisprudence.[60]

Finally, the Committee has taken this occasion to pronounce an innovative doctrine that any procedural irregularities in a capital trial, violating article 14, will serve to transform the sentence itself into a violation of article 7. The rationale offered is that a person wrongly convicted, in a procedurally imperfect trial, must suffer greater anguish than a defendant in a procedurally sound capital trial. To be sure, there is no doubt that the prospect of a death sentence is the occasion for anguish on the part of any defendant. But the Covenant did not abolish the death penalty. Within the Covenant itself, the commitments of article 7 against "torture" or "cruel, inhuman or degrading or punishment" are profound, and should not be used as a redundant form of chastisement of states parties that have not chosen to abolish capital punishment.

The Committee's cryptic statement that "the imposition of any death sentence that cannot be saved by article 6 would automatically entail a violation of article 7" is not supported by the cited case of *Errol Johnson v. Jamaica*, communication No. 588/1994, adopted 22 March 1996. The case of *Errol Johnson v. Jamaica* rather focuses on whether a prolonged presence on death row would itself constitute a form of inhuman treatment, and concludes that there is no set term of years to measure such an assertion.

Rather, the Committee's abrupt holding seems to be an importation from the European Court of Human Rights, from the case of *Ocalan v. Turkey*, application No. 43221/99, 12 May 2005, paras. 167-175. But the Strasbourg court has argued that the wide consensus within the European Community on the abolition of the death penalty is itself justification for using a teleological mode of interpretation. See *Ocalan v. Turkey*, paras. 162-164. In contrast, the Second Optional Protocol to the International Covenant on Civil and Political Rights Aiming at the Abolition of the Death Penalty, which came into force on 11 July 1991, currently is limited to 57 States parties and 7 additional signatories. This is a minority out of the 156 States parties and 6 signatories who have adhered to the Covenant itself. The conscientious views of members of the Committee concerning the death penalty do not supply a warrant for setting aside the treaty text and disregarding the consent of sovereign states. In any event, as the record of this case shows, the Philippines has now abolished capital punishment.[61]

(*Signed*): Ruth Wedgwood

[Done in English, French and Spanish, the English text being the original version. Subsequently to be issued in Arabic, Chinese and Russian as part of the Committee's annual report to the General Assembly.]

Notes

[1] Communication No. 1110/2002, *Rolando v. The Philippines*, Views adopted on 3 November 2004, individual opinion by Mr. Martin Scheinin, Ms. Christine Chanet and Mr. Rajsoomer Lallah; and communication No. 869/1999, *Piandong et al. v. The Philippines*, Views adopted on 19 October 2000, para. 7.4. See also No. 829/1998, *Judge v. Canada*, Views adopted on 5 August 2003, para. 10.4; communication No. 470/1991, *Kindler v. Canada*, Views adopted on 30 July 1993, individual opinions by Mr. Fausto Pocar and Mr. Bertil Wennergren;

and No. 539/1993, *Cox v. Canada*, Views adopted on 31 October 1994, individual opinions of Ms. Christiane Chanet, Mr. Fausto Pocar, and Mr. Francisco Jose Aguilar Urbina.

[2] *People of the Philippines v. Echegaray*, GR No. 117472, 7 February 1997.

[3] Communication No. 806/1998, *Thompson v. Saint Vincent and the Grenadines*, Views adopted on 18 October 2000, para. 8.2; communication No. 845/1998, *Kennedy v. Trinidad and Tobago*, Views adopted on 26 March 2002, para. 7.3; communication No. 1077/2002, *Carpo et al. v. The Philippines*, Views adopted on 28 March 2003, para. 8.3; communication No. 1167/2003, *Rayos v. The Philippines*, Views adopted on 27 July 2004, para. 7.2; and communication No. 1110/2002, *Rolando v. The Philippines*, Views adopted on 3 November 2004, para. 5.2. See also *Concluding Observations of the Human Rights Committee on the Philippines*, CCPR/CO/79/PHL, 1 December 2003, para. 10.

[4] General comment No. 13/21 of 13 April 1984, para. 7.

[5] Communication No. 971/2001, *Arutyuniantz v. Uzbekistan*, Views adopted on 30 March 2005, para. 6.4.

[6] Communication No. 263/1987, *González del Rio v. Peru*, Views adopted on 28 October 1992, para. 5.2.

[7] Communication No. 5/1977, *Ambrosini et al. v. Uruguay*, Views adopted on 15 August 1979, para. 0; and communication No. 8/1977, *Weismann and Perdomo v. Uruguay*, Views adopted on 3 April 1990, para. 16.

[8] Communication No. 815/1998, *Dugin v. Russian Federation*, Views adopted on 5 July 2004, para. 9.3.

[9] Communication No. 139/1983, *Conteris v. Uruguay*, Views adopted on 17 July 1985, para. 10; and communication No. 32/1978, *Touron v. Uruguay*, Views adopted on 31 March 1981, para. 12.

[10] General comment No. 13/21 of 13 April 1984, para. 11.

[11] Ibid., para. 12.

[12] Communication No. 480/1991, *Fuenzalida v. Ecuador*, Views adopted on 12 July 1996, para. 9.5; communication No. 1117/2002, *Khomidov v. Tajikistan*, Views adopted on 29 July 2004, para. 6.5; and communication No. 353/1988, *Grant v. Jamaica*, Views adopted on 31 March 1994, para. 8.5.

[13] Communications Nos. 464/1991 and 482/1991, *Peart and Peart v. Jamaica*, Views adopted on 19 July 1985, para. 11.5.

[14] Communication No. 330/1988, *Berry v. Jamaica*, Views adopted on 7 April 1994, para. 11.4; and communication No. 1167/2003, *Rayos v. The Philippines*, Views adopted on 27 July 2004, para. 7.3.

[15] Communication No. 49/1979, *Marais v. Madagascar*, Views adopted on 24 March 1983, para. 19; and communication No. 283/1988, *Little v. Jamaica*, Views adopted on 1 November 1991, para. 8.3.

[16] Communication No. 253/1987, *Kelly v. Jamaica*, Views adopted on 8 April 1991, para. 5.10.

[17] Communication No. 1189/2003, *Fernando v. Sri Lanka*, Views adopted on 31 March 2005, para. 9.2.

[18] Communication No. 232/1987, *Pinto v. Trinidad and Tobago*, Views adopted on 20 July 1990, para. 12.5; and communication No. 223/1987, *Robinson v. Jamaica*, Views adopted on 30 March 1989, para. 10.3.

[19] Communication No. 52/1979, *Sadías de Lopez v. Uruguay*, Views adopted on 29 July 1981, para. 13; communication No. 74/1980, *Estrella v. Uruguay*, Views adopted on 29 March 1983, para. 10; communication No. 232/1987, *Pinto v. Trinidad and Tobago*, Views adopted on 20 July 1990, para. 12.5; and communication No. 677/1996, *Teesdale v. Trinidad and Tobago*, Views adopted on 1 April 2002, para. 9.6.

[20] Communication No. 796/1998, *Reece v. Jamaica*, Views adopted on 14 July 2003, para. 7.2; and communication No. 775/1997, *Brown v. Jamaica*, Views adopted on 23 March 1999, para. 6.6.

[21] Communication No. 240/1987, *Collins v. Jamaica*, Views adopted on 1 November 1991, individual opinion by Ms. Christine Chanet, Mr. Kurt Herndl, Mr. Francisco José Aguilar Urbina and Mr. Bertil Wennergren; and communication No. 387/1989, *Karttunen v. Finland*, Views adopted on 23 October 1992, para. 7.2.

[22] Communication No. 387/1989, *Karttunen v. Finland*, Views adopted on 23 October 1992, para. 7.3.

[23] Communication No. 1015/2001, *Perterer v. Austria*, Views adopted on 20 August 2004, para. 10.2; and communication No. 387/1989, *Karttunen v. Finland*, Views adopted on 23 October 1992, para. 7.2.

[24] Communication No. 207/1986, *Morael v. France*, Views adopted on 28 July 1989, para. 9.3.

[25] General comment No. 13/21 of 13 April 1984, para. 19.

[26] Communication No. 848/1999, *Orejuela v. Columbia*, Views adopted on 23 July 2002, para. 7.3.

[27] Communication No. 387/1989, *Karttunen v. Finland*, Views adopted on 23 October 1992, para. 7.3.

[28] General comment No. 13/21 of 13 April 1984, para. 17.

[29] Communication No. 232/1987, *Pinto v. Trinidad and Tobago*, Views adopted on 20 July 1990, para. 12.5.

[30] Communication No. 387/1989, *Karttunen v. Finland*, Views adopted on 23 October 1992, individual opinion by Mr. Bertil Wennergren.

[31] Communication No. 973/2001, *Khalilov v. Tajikistan*, Views adopted on 30 March 2005, para. 7.5; and communication No. 1073/2002, *Terrón v. Spain*, Views adopted on 5 November 2004, para. 7.4.

[32] Communication No. 64/1979, *Salgar de Montejo v. Colombia*, Views adopted on 24 March 1982, paras. 9.1 and 11.

[33] General comment No. 13/21 of 13 April 1984, para. 10; communication No. 43/1979, *Caldas v. Uruguay*, Views adopted on 21 July 1983, paras.12.1 and 14; communication No. 864/1999, *Agudo v. Spain*, Views adopted on 31 October 2002, para. 9.1; and communication No. 203/1986, *Hermoza v. Peru*, Views adopted on 4 November 1988, para. 11.3.

[34] Communication No. 677/1996, *Teesdale v. Trinidad and Tobago*, Views adopted on 1 April 2002, para. 9.3; and communication No. 56/1979, *de Casariego v. Uruguay*, Views adopted on 29 July 1981, para. 11.

[35] Communication No. 938/2000, *Siewpersaud et al. v. Trinidad and Tobago*, Views adopted on 29 July 2004, para. 6.2; communication No. 683/1996, *Wanza v. Trinidad and Tobago*, Views adopted on 26 March 2002, para. 9.4; communication No. 580/1994, *Ashby v. Trinidad and Tobago*, Views adopted on 21 March 2002, para. 10.5; communication No. 677/1996, *Teesdale v. Trinidad and Tobago*, Views adopted on 1 April 2002, para. 9.4; communications No. 210/1986 and 225/1987, *Pratt and Morgan v. Jamaica*, Views adopted on 6 April 1989, para. 13.4; and communication No. 27/1977, *Pinkney v. Canada*, Views adopted on 29 October 1981, para. 22.

[36] Communication No. 203/1986, *Hermoza v. Peru*, Views adopted on 4 November 1988, para. 11.3; and communication No. 43/1979, *Caldas v. Uruguay*, Views adopted on 21 July 1983, para. 12.1.

[37] Communication No. 250/1987, *Reid v. Jamaica*, Views adopted on 20 July 1990, para. 11.5; communication No. 16/1977, *Mbenge v. Zaire*, Views adopted on 25 March 1983, para. 17; and communication No. 349/1989, *Wright v. Jamaica*, Views adopted on 27 July 1992, para. 8.7.

[38] Communication No. 470/1991, *Kindler v. Canada*, Views adopted on 30 July 1993, paras. 15.2 and 15.3; and communications No. 270-271/1988, *Barrett and Sutcliffe v. Jamaica*, Views adopted on 30 March 1992, para. 8.4.

[39] Communications Nos. 210/1986 and 225/1987, *Pratt and Morgan v. Jamaica*, Views adopted on 6 April 1989, para. 13.6; communication No. 599/1994, *Spence v. Jamaica*, Views adopted on

18 July 1996, para. 7.1; and communication No. 720/1996, *Morgan and Williams v. Jamaica*, Views adopted on 3 November 1998, para. 6.3.

[40] Communication No. 1110/2002, *Rolando v. The Philippines*, Views adopted on 3 November 2004, individual opinion by Mr. Martin Scheinin, Ms. Christine Chanet and Mr. Rajsoomer Lallah.

[41] Communication No. 1167/2003, *Rayos v. The Philippines*, Views adopted on 27 July 2004, para. 7.1; and communication No. 1110/2002, *Rolando v. The Philippines*, Views adopted on 3 November 2004, para. 5.4.

[42] Communications Nos. 210/1986 and 225/1987, *Pratt and Morgan v. Jamaica*, Views adopted on 6 April 1989, para. 13.4.

[43] Communication No. 1073/2002, *Terron v. Spain*, Views adopted on 5 November 2004, para. 6.5; and communication No. 1101/2002, *Cabriada v. Spain*, Views adopted on 1 November 2004, para. 6.5.

[44] *People of The Philippines v. Echegaray*, GR No. 117472, 7 February 1997.

[45] Communication No. 806/1998, *Thompson v. Saint Vincent and the Grenadines*, Views adopted on 18 October 2000, para. 8.2; and communication No. 845/1998, *Kennedy v. Trinidad and Tobago*, Views adopted on 26 March 2002, para. 7.3.

[46] Communication No. 1077/2002, Views adopted on 28 March 2003, individual opinions of Mr. Nisuke Ando and Ms. Ruth Wedgewood.

[47] Communication No. 1189/2003, *Fernando v. Sri Lanka*, Views adopted on 31 March 2005, para. 9.2.

[48] Communication No. 1110/2002, *Rolando v. The Philippines*, Views adopted on 3 November 2004, para. 4.5.

[49] *Reclusion perpetua* means imprisonment for between 20 and 40 years, with a possibility of parole after 30 years, whereas life imprisonment means life without parole.

[50] Communication No. 806/1998, *Thompson v. St. Vincent and The Grenadines*, Views adopted on 18 October 2000; communication No. 845/1998, *Kennedy v. Trinidad and Tobago*, Views adopted on 26 March 2002; and communication No. 1077/2002, *Carpo v. The Philippines*, Views adopted on 28 March 2003.

[51] Communication No. 971/2001, *Arutyuniantz v. Uzbekistan*, Views adopted on 30 March 2005, para. 6.4.

[52] Communication No. 594/1992, *Philip v. Trinidad and Tobago*, Views adopted on 20 October 1998, para. 7.2; and communication No. 913/2000, *Chan v. Guyana*, Views adopted on 31 October 2005, para. 6.3.

[53] Communication No. 232/1987, *Pinto v. Trinidad and Tobago*, Views adopted on 20 July 1990, para. 12.5.

[54] Communication No. 536/93, *Perera v. Australia*, Views adopted on 28 March 1995, para. 6.4; communication No. 534/1993, *H.T.B. v. Canada*, Views adopted on 19 October 1993, para. 4.3; and communication No. 1110/2002, *Rolando v. The Philippines*, Views adopted on 3 November 2004, para. 4.5.

[55] Communication No. 387/1989, *Karttunen v. Finland*, Views adopted on 23 October 1992, para. 7.3. See also European Court of Human Rights, *Ekbatani v. Sweden*, application No. 10563/83, 26 May 1988, para. 32.

[56] Communication No. 973/2001, *Khalilov v. Tajikistan*, Views adopted on 30 March 2005, para. 7.5.

[57] Communication No. 390/1990, *Lubuto v. Zambia*, Views adopted on 31 October 1995, para. 7.3.

[58] Communication No. 588/1994, *Errol Johnson v. Jamaica*, Views adopted on 22 March 1996, paras. 8.2 and 8.3.

[59] European Court of Human Rights, *Öcalan v. Turkey*, application No. 43221/99, 12 May 2005, paras. 167-175.

[60] The author in this case has alleged that one of the judges on the Supreme Court of the Philippines had a wife who was a great-aunt of one of the victims of the crime. See Views of the Committee, paragraph 3.10. This would be an exceedingly troubling fact, and based on our decision in Karttunen, would be enough to find a violation of article 14 (1). But the State party has asserted that the judge took no part in the proceedings "as indicated in the notation in the decision next to his name". See Views of the Committee, paragraph 4.13. The Committee has not attempted to gainsay that assertion or to further clarify the record of the case.

[61] In regard to the Committee's observations in paragraph 7.2, I would reference my separate opinion in *Carpo v. Philippines*, No. 1077/2002, 28 March 2003.

Annex VI

DECISIONS OF THE HUMAN RIGHTS COMMITTEE DECLARING COMMUNICATIONS INADMISSIBLE UNDER THE OPTIONAL PROTOCOL TO THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS

A. Communication No. 993-995/2001, *Crippa, Masson & Zimmermann v. France* (Decision adopted on 28 October 2005, eighty-fifth session)[*]

Submitted by:	Gabriel Crippa, Jean-Louis Masson and Marie-Joe Zimmermann (not represented by counsel)
Alleged victim:	The authors
State party:	France
Date of communications:	1 September 2000, 13 March 2001, 13 March 2001 (initial submissions)
Subject matter:	Electoral dispute brought before the Constitutional Council
Procedural issues:	Reservation made by the State party; status of victim; inadmissibility *ratione materiae;* substantiation of the complaint
Substantive issues:	Nature of the electoral dispute in the context of article 14 of the Covenant; right to free elections; attack on a person's honour; right to a remedy
Articles of the Covenant:	2 (3) (a), (b); 14 (1), (3) (a), (b), (5), (7); 15 (1); 17 (1) and 25
Articles of the Optional Protocol:	1; 2; 3; 5, 2 (a)

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

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[*] The following members of the Committee participated in the examination of the present communication: Mr. Nisuke Ando, Mr. Prafullachandra Natwarlal Bhagwati, Mr. Alfredo Castillero Hoyos, Mr. Maurice Glèlè Ahanhanzo, Mr. Edwin Johnson, Mr. Walter Kälin, Mr. Ahmed Tawfik Khalil, Mr. Rajsoomer Lallah, Mr. Michael O'Flaherty, Ms. Elisabeth Palm, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Ivan Shearer, Mr. Hipólito Solari-Yrigoyen, Ms. Ruth Wedgwood and Mr. Roman Wieruszewski.

Pursuant to rule No. 90 of the Committee's rules of procedure, Ms. Christine Chanet did not participate in the consideration of this communication.

Meeting on 28 October 2005,

Adopts the following:

Decision on admissibility

1. The authors of the communications, French citizens Ms. Marie-Joe Zimmermann, Mr. Jean-Louis Masson and Mr. Gabriel Crippa, claim to have been victims of violations by France of article 2, paragraphs 3 (a) and (b), article 14, paragraphs 1, 3 (a) and (b), 5 and 7, article 15, paragraph 1, article 17, paragraph 1, and article 25 of the Covenant. They are not represented by counsel.

Factual background

2.1 Following the parliamentary elections which took place on 25 May and 1 June 1997, Mr. Masson, the chair of the local party "*Metz pour tous*" (Metz for all), was re-elected deputy for the third constituency in Moselle department, with Ms. Zimmermann as his substitute.

2.2 He defeated the other candidates, including Mr. Crippa, the representative of ADL, the *Association de défense des locataires* (Tenants' Protection Association), which had been set up to denounce embezzlement in the operations of the public office managing low-rent housing in the city of Metz.

2.3 Mr. Crippa's and Mr. Masson's campaign accounts were approved by the National Commission on Election Campaign Accounts and Political Funding.

2.4 Nevertheless, in response to two applications lodged by voters registered on the electoral rolls for the constituency, the Constitutional Council, in a decision of 16 December 1997, annulled the electoral operations. The Constitutional Court ruled that Mr. Crippa's candidature must be regarded as constituting a manoeuvre which enabled Mr. Masson to make use, for the purposes of his campaign, of certain electoral materials the cost of which is not recorded in his own campaign accounts, but in those of Mr. Crippa; that Mr. Crippa and Mr. Masson ignored the principles of single and exhaustive campaign accounts as set out in article L.52-12 of the Elections Code. It also disqualified Mr. Crippa and Mr. Masson from standing for election for a period of one year from that date.

The Constitutional Council considered that it had before it sufficient reliable and consistent evidence to establish that Mr. Masson, the outgoing deputy, had prompted Mr. Crippa to stand with the sole aim of favouring his own candidature through the presence of a third candidate, and had fully financed Mr. Crippa's campaign through an association of which he was the founder and the chair.

2.5 The annulment of the contested electoral operations also entailed annulment of the election of Ms. Zimmermann as a substitute, in accordance with the legislation and constant jurisprudence of France.

The complaint

3.1 The authors challenge the procedure followed within the Constitutional Council as well as the Council's decision. They point out that when an application is not declared inadmissible or manifestly ill-founded by the Council, the member of parliament whose election has been challenged and, where appropriate, his or her substitute, are notified accordingly; they may designate a person of their choice to represent them and assist them in the various procedural steps. After having been notified of the application, they may submit written observations. In addition, the complainants and the deputies whose election has been challenged may ask to be heard by the Council. Lastly, no appeal is possible against the decisions of the Constitutional Council. Ms. Zimmermann states that she has been the direct victim of a violation of her rights as protected under the Covenant by virtue of the annulment of her election as substitute, and an indirect victim of the violations of the rights of Mr. Masson and Mr. Crippa by the Constitutional Council.

3.2 The authors allege violations of the right to a fair trial and the consequential guarantees under article 14, paragraphs 1 and 3 (a) and (b). They denounce the fact that Mr. Crippa was not informed that proceedings had been instituted against him, which they consider an irregularity which amounts to a procedural violation that affects all the authors. They also complain that Mr. Masson was not notified that he had been charged with ignoring the principle of the single account, and that they did not have access to the case files (consulting the campaign accounts of their adversaries in the elections). They further challenge the secret and non-adversary nature of the proceedings before the Constitutional Council, pointing out that, as the report prepared by the Constitutional Council's reporting member is not made available to the parties, the parties are unable to respond to any accusations made against them.

3.3 The authors point out that the Constitutional Council's decision constitutes a violation of article 14, paragraph 7, of the Covenant, insofar as the candidates' accounts had been approved by the National Commission on Election Campaign Accounts, in a final ruling.

3.4 The authors state that they were convicted for an act or omission which is not a criminal offence under French law, in violation of article 15, paragraph 1, of the Covenant. In that regard, they state that the principle of a single campaign account invoked against them by the Constitutional Council is in fact contrary to the law, which stipulates that each candidate shall submit a separate account. Accordingly, in the authors' view, the Constitutional Council failed to give their case a fair hearing, in breach of article 14, paragraph 1, of the Covenant.

3.5 The authors state that the Constitutional Council's decision was not impartial, but stemmed from a political desire on the part of the Council, which was composed of left-wing figures, to harm the interests of right-wing and extreme right-wing deputies during the parliamentary elections, and, in the case of J.-L. Masson, to punish him for his statements in the National Assembly denouncing the involvement of senior Freemasons and former ministers in left-wing governments, including the former Chair of the Constitutional Council and the Mayor of Metz, in political and financial scandals. The authors claim a violation of article 14, paragraph 1, of the Covenant.

3.6 They also consider that the Constitutional Council's decision constitutes a violation of the right to stand for election and to organize an election campaign freely, as protected under article 25 of the Covenant, and an attack on their honour, in breach of article 17, paragraph 1, of the Covenant.

3.7 They emphasize the seriousness of the "civil" consequences of the disqualification of Mr. Masson and Mr. Crippa. They explain that, following the Constitutional Council's decision, the two authors the Council had ruled against were obliged to repay to the authorities the amount they had been paid by the State under the law. Mr. Masson was denied the financial guarantee paid to former deputies who had not been re-elected (30,000 francs for a period of six months) because of his disqualification, as well as the honorary title granted to all deputies of more than 18 years' standing. Moreover, according to the authors, disqualification is a penal measure because it involves a loss of civil rights, because under article L.131-26 of the new Penal Code it is ancillary or additional to certain penalties imposed by the criminal courts, and because candidates whose campaign accounts are rejected can be prosecuted under article L.113-1 of the Elections Code and can be sentenced to a fine or a prison term.

3.8 Lastly, according to the authors, the fact that no appeals can be lodged against the Constitutional Council's decisions is contrary to article 2, paragraph 3 (a) and (b), and article 14, paragraph 5, of the Covenant. The authors also consider that France's reservation concerning article 14, paragraph 5, cannot apply in the present case since it relates to minor and major offences, but not ordinary offences.

3.9 The authors state that they have exhausted all domestic remedies. Ms. Zimmermann and Mr. Crippa state that the case has not been submitted to another procedure of international investigation or settlement. Mr. Masson states that the present case was brought before the European Court of Human Rights, which declared it inadmissible on the grounds that the dispute is exclusively electoral in nature (not civil or criminal). Citing communication No. 441/1990 (*Casanovas v. France*), Mr. Masson considers that the European Court did not rule on the substance and that France's reservation therefore does not apply.

State party's observations

4.1 In its observations dated 22 October 2001, the State party challenges the admissibility of the communications.

4.2 Firstly, the State party cites France's reservation concerning article 5, paragraph 2 (a), of the Optional Protocol in respect of the communication from Mr. Masson. Regarding the reference made by the author to communication No. 441/1990 (*Casanovas v. France*), it should be pointed out, in the view of the State party, that the European Court declared Mr. Masson's application inadmissible not only because some of his claims were incompatible *ratione materiae* with the Convention, but also because the communication was manifestly unfounded. The claims based on the violation of article 3 of the Protocol, articles 1, 13 and 14 of the Convention were declared inadmissible on the grounds that they were manifestly ill-founded. Consequently, according to the State party, the claims based on the violation of article 2, paragraph 3, and article 25 of the Covenant, relating to the same rights as those which the European Court considered not to have been violated, namely the right to a remedy and the right to free elections, are clearly inadmissible, bearing in mind France's reservation. As regards the claims in the communication that article 6, paragraphs 1 and 3, of the Convention had been ignored, which were considered inadmissible *ratione materiae*, the State party considers that the same conclusion of inadmissibility should be reached. In its observations on communication No. 441/1990 (*Casanovas v. France*), the Committee had considered the communication admissible after having taken care to point out that "the rights of the European Convention differed in substance and with regard to their implementation procedures from the rights set out in the Covenant". In this case, the State party considers that the rights guaranteed by article 6, paragraphs 1 and 3, of the Convention are of exactly the same kind as those guaranteed by articles 14 and 15 of the Covenant, so that these complaints are inadmissible. The State party points out that the Committee adopted such a solution in its observations on communication No. 168/1984 (*V.Ø. v. Norway*). The State party notes that its reservation is drafted in terms strictly identical to those of the Norwegian reservation, and that the dispute brought before the Committee concerns the same parties, the same complaints and the same facts as those at issue before the European Court.

4.3 Secondly, the State party considers that Ms. Zimmermann's communication is inadmissible as she has not demonstrated her status as a victim of a violation of the Covenant. The decision by which the Constitutional Council annulled the electoral operations and disqualified Mr. Crippa and Mr. Masson for a year infringed none of Ms. Zimmermann's rights. Under article L.O. 176-1 of the Elections Code, her status as Mr. Masson's substitute authorized her to replace him only in the event of "death, acceptance of government office or membership of the Constitutional Council or extension beyond six months of a temporary mission assigned by the government". In contrast, the annulment of the electoral operations and the disqualification of Mr. Masson enabled her to stand in the parliamentary election which was held following the annulment and to be elected as a deputy on 1 February 1998.

4.4 Thirdly, the State party maintains that the claims made are incompatible with the provisions of the Covenant, directly, in the case of Mr. Crippa, and in a subsidiary manner for Mr. Masson and Ms. Zimmermann.

4.5 According to the State party, this incompatibility relates in the first place to the complaints raised under articles 14 and 15 of the Covenant. The State party explains that these two articles concern only civil rights and obligations and criminal charges, and are not applicable to the present dispute, which is political in nature. Referring to general comment No. 13, the State party points out that in domestic law, the present dispute falls outside the criminal realm and does not relate to any right of a civil nature. It raises the issue of a political right, one governed by a completely separate set of rules, which accounts for the competence not of the ordinary courts, but of the Constitutional Council, as article 59 of the Constitution provides. Consequently, the authors cannot invoke any right of a civil nature within the meaning of article 14, paragraph 1, of the Covenant. The State party adds that the European Court of Human Rights has already ruled along these lines in relation to the provisions of article 6, paragraph 1, of the Convention, which is similarly worded. The right to stand for election to the National Assembly and to keep one's seat "is a political one and not a 'civil' one within the meaning of article 6, paragraph 1, so that disputes relating to the arrangements for the exercise of it - such as ones concerning candidates' obligation to limit their election expenditure - lie outside the scope of that provision", even if disqualification has the corollary that it is impossible to secure reimbursement of campaign expenditure from public funds, and is therefore partly economic in nature. What is more, the Court reiterated its position on the matter when, in the circumstances referred to above, it considered Mr. Masson's application in relation to the disputed elections: "The Court notes that the dispute in question concerned whether the electoral operations were properly conducted, notwithstanding its economic implications for the applicant. Therefore it did not involve a determination of the latter's civil rights and obligations ... ." According to the State party, in this case, the distinction between disputes of a civil and those of a political nature is all the more clear since it is necessarily imposed by the title of the Covenant. If the Covenant's authors had planned to harness these distinct rights together, no reference would have been made to political rights.

4.6 The State party also considers that the authors could not claim that any criminal charge had been brought against them, again within the meaning of article 14, paragraph 1, of the Covenant. Once again, it must be noted that article 14, paragraph 1, of the Covenant contains similar wording to the European Convention. The European Court refuses to consider that disqualification constitutes a criminal matter. In order to determine whether a criminal charge has been brought against an applicant within the meaning of article 6, paragraph 1, of the Convention, the Court has regard to three criteria: "the legal classification of the offence in question in national law, the very nature of the offence and the nature and degree of severity of the penalty". In the above-mentioned Masson ruling, the Court very precisely analysed the arrangements for the financing of electoral campaigns in the following terms: "(The Court) observes that the Elections Code establishes the principle of capping election expenditure by parliamentary candidates and monitoring compliance with that principle. Each candidate is thus required, inter alia, to prepare and file campaign accounts in keeping with the provisions of article L.52-12 of the Elections Code. A person who has not filed his or her campaign accounts in accordance with the requirements and within the time limit laid down in article L.52-12 (such as the applicant), whose campaign accounts have been rejected or who has exceeded the maximum permitted amount of electoral expenditure may be disqualified from standing for election for a period of one year (Elections Code, art. L.O. 128); if that person was the candidate elected, the Constitutional Council declares that the person has forfeited his or her seat (Elections Code, art. L.O. 136-1)". Applying the three above-mentioned criteria, the Court concluded: "Those provisions clearly do not belong to French criminal law, but to electoral law. Nor can a breach of a legal rule governing such a matter be described as 'criminal' by nature. Moreover, the disqualification for one year does not constitute, either by nature or in terms of the degree of severity of that penalty, a punishment which brings the issue into the 'criminal' realm. Lastly, the punishments stipulated in article L.113-1 of the Elections Code could not be applicable in this case, as no proceedings were brought against the applicant on the basis of that article." Consequently, the Court considered that the complaints, which were identical to those lodged by Mr. Masson in the present case, and were based on the assertion that his case had not been given a fair and public hearing by an independent and impartial tribunal, are incompatible *ratione materaie* with the provisions of the Convention. According to the State party, the same solution should be adopted in the present case.

4.7 Concerning the authors' complaints that they were not informed that the Constitutional Council held them responsible for ignoring the principle of single accounts, in breach of article 14, paragraph 3, of the Covenant, that they were convicted when the decision of the National Commission on Election Campaign Accounts had become final, in breach of article 14, paragraph 7, of the Covenant, and that there was no appeal against the ruling of the Constitutional Council, in disregard of article 14, paragraph 5, of the Covenant, the State party points out that here too, the European Court considered that this part of Mr. Masson's application, citing a violation of article 6, paragraphs 3 and 7, of the Convention, was incompatible *ratione materaie* with these provisions. The Court ruled that "as no criminal charge, in the meaning of article 6, paragraph 1, of the Convention had been brought against the applicant, he could not claim to have been 'charged with a criminal offence' in the meaning of article 6, paragraph 3". The Court added: "The same applies to article 7 of the Convention, as the applicant has not been 'held guilty' of a criminal 'offence'." According to the State party, this solution may be adopted in the present case since article 14, paragraph 3, of the Covenant enumerates the rights of "everyone [who has been] charged", article 14, paragraph 5, provides for appeal for "everyone [who has been] charged" and article 14, paragraph 7, deals with the case of a person "punished again for an offence for which he has already been ... convicted".

4.8 Concerning the complaint of a violation of article 15 of the Covenant, the State party considers that this part of the communications is incompatible with the provisions of the Covenant insofar as article 15 refers to a person held guilty of a "criminal offence", whereas exceeding the cap on electoral expenditure, with which Mr. Masson and Mr. Crippa are charged, does not constitute a criminal offence either in French law or within the meaning of the Covenant.

4.9 With regard to the claimed violation of article 17 of the Covenant, the State party points out that disqualification does not constitute an attack on the honour of the authors, but is based solely on the fact that the cap on campaign expenditure was exceeded. Disqualification is provided for in article L.O. 128, paragraph 2, of the Elections Code, under which "a person who has not filed his or her campaign accounts in accordance with the requirements and within the time limit laid down in article 52-12, or whose campaign accounts have been rightly rejected, is disqualified from standing for election for a period of one year. Anyone who has exceeded the maximum permitted amount of electoral expenditure as laid down in article L.52-11 may likewise be disqualified from standing for election for the same length of time". Hence it follows from the very terms of these provisions that disqualification is the automatic consequence of exceeding the cap on campaign expenditure. Furthermore, the Committee has pointed out that the term "unlawful" means that no interference can take place except in cases envisaged by the law. Interference authorized by States can only take place on the basis of law, which itself must comply with the provisions, aims and objectives of the Covenant. As provision is made for disqualification in article L.O. 128 of the Elections Code, it is therefore not "unlawful". What is more, according to the State party, this disqualification is in keeping with the purposes of article 25 of the Covenant. Capping the electoral expenditure effected by the candidates clearly has the purpose of guaranteeing freedom of expression for voters, a fair and genuine ballot and equal access to elective public office. The disqualification which may be imposed in the event that these rules are ignored has the same purpose. Hence this is an interference based on a law which is in keeping with the objectives of the Covenant. Lastly, it should be emphasized that the law entrusts the task of imposing this disqualification to a court, clearly affording an additional safeguard for those concerned. The State party therefore considers that the alleged violation of article 17 of the Covenant is incompatible with the provisions of the Covenant.

4.10 Concerning the alleged violation of article 25 of the Covenant, the State party explains that this article is worded similarly to article 3 of the Additional Protocol to the European Convention. When considering the admissibility of Mr. Masson's application, the European Court pointed out that "this article guarantees the right to stand for election to the legislature, and to serve one's term once elected". The Court then recognized that "this right is, however, not absolute: States may attach conditions to it, and they have a wide margin of appreciation in this sphere. The Court's task then involves satisfying itself that the conditions do not curtail the right in question to such an extent as to impair its very essence and deprive it of its effectiveness; that they are imposed in pursuit of a legitimate aim; and that the means employed are not disproportionate. In particular, such conditions must not thwart "the free expression of the opinion of the people in the choice of the legislature". The Court then provided the following assessment of the French system governing campaign expenditure: "The capping of election expenditure by parliamentary candidates and the monitoring of compliance with that principle, as applied by the French Elections Code, are designed to ensure a degree of equality among the candidates, and thus form part of measures to safeguard 'the free expression of the opinion of the people in the choice of the legislature'; the threat of disqualification then constitutes an appropriate means of obliging the candidates to comply with these rules. In this way, although the measure adopted in respect of the applicant is viewed as an interference with his right to stand for election as a deputy and to serve his term, the legitimacy of the purpose of the measure is not in doubt. Indeed, it is not truly called into question by the applicant, whose criticisms relate essentially to the allegedly arbitrary and unfair nature of the decision on his case taken by the Constitutional Council." After enumerating the grounds for the Constitutional Council's decision, and expressing the view that the disputed measure cannot be regarded as disproportionate to the legitimate purpose, the Court ruled that this part is manifestly ill-founded and therefore inadmissible. The State party considers that by the same reasoning the authors' complaint of a violation of article 25 is inadmissible because it is incompatible with the provisions of the Covenant.

4.11 In relation to the complaint concerning a violation of article 2, paragraph 3, of the Covenant, on the grounds that there is no appeal against decisions of the Constitutional Council, the State party considers that the authors do not cite a grievance which is an arguable one in terms of the Covenant, as set out above. The Committee has pointed out that the general right to a remedy is an accessory one.[1] According to the State party, the European Court, in its decision on the admissibility of Mr. Masson's application, adopted similar reasoning: "The Court points out that, while article 13 of the Convention guarantees that domestic law will contain provision for a remedy whereby the rights and freedoms enshrined in the Convention can be invoked, this provision is valid only for grievances which are arguable in terms of the Convention. In the light of its conclusions relating to the other complaints raised by the applicant, the Court considers that this condition has not been met in this case." The Court considered that this part of the application too was manifestly ill-founded. The State party consequently considers that the same solution of inadmissibility will apply in this case.

Comments by the authors on the State party's observations

5.1 In their comments dated 22 January and 7 October 2002, the authors challenge the arguments of the State party in favour of inadmissibility. Concerning the reservation lodged by France under article 5, paragraph 2 (a), of the Optional Protocol in respect of Mr. Masson's communication, they challenge that ground for inadmissibility insofar as the Committee and the European Court of Human Rights, in their view, perform different monitoring functions, and the Covenant differs in part from the European Convention, specifically article 25. In addition, the authors call into question the European Court's inadmissibility ruling, which, in their view, while acknowledging the existence of civil and criminal implications of the decisions of the Constitutional Council, wrongly deems them to be of an accessory nature, and considers that the principal decision is a political one.

5.2 With regard to the State party's inadmissibility arguments under article 1 of the Optional Protocol in respect of Ms. Zimmermann, the authors point out that she had initially been elected as substitute to Mr. Masson. Consequently, the annulment of the election by the Constitutional Council was prejudicial to her in three ways: politically, as a result of the annulment of her election; civilly, because of the cancellation of the reimbursement by the State for her election campaign; and criminally, because the disqualification of Mr. Masson had moral repercussions for his substitute. The authors state that the subsequent election of Ms. Zimmermann as a deputy did not eliminate the initial injustice caused by the Constitutional Council.

5.3 Lastly, the authors challenge the State party's other inadmissibility arguments and reiterate the content of their complaint.

The Committee's deliberations on admissibility

6.1 Before considering any claim contained in a communication, the Human Rights Committee must, in accordance with rule 93 of its rules of procedure, decide whether or not the communication is admissible under the Optional Protocol to the Covenant.

6.2 In view of the fact that communications Nos. 993/2001, 994/2001 and 995/2001 relate to the same subject and can therefore legitimately be dealt with together, the Committee decides to deal with these three communications jointly.

6.3 In relation to Mr. Masson and his complaints under article 14, paragraphs 1, 3 (a) and 5; article 15, paragraph 1; article 25; and article 2, paragraphs 3 (a) and (b), of the Covenant, the Committee notes that the European Court of Human Rights, on 14 September 1999, denied the author's appeal relating to the same facts and points in dispute as those now before the Committee. The Committee also points out that at the time of its accession to the Optional Protocol, the State party lodged a reservation concerning article 5, paragraph 2 (a), of the Optional Protocol, specifying that the Committee "shall not have competence to consider a communication from an individual if the same matter is being examined or has already been considered under another procedure of international investigation or settlement".

6.4 The Committee notes that the European Court considered that the author's allegations concerning violations of the right to a fair trial and certain related guarantees for persons charged with a criminal offence, as well as conviction for an act which did not constitute an offence in domestic law, were incompatible *ratione materaie* with the provisions of the European Convention insofar as, according to the Court, the dispute in question did not involve a determination of civil rights and obligations and no criminal charges had been brought against the author. The Committee recalls its jurisprudence that complaints that had been declared inadmissible *ratione materaie* had not, in the meaning of the reservation, been considered in such a way that, in the case in question, the Committee was precluded from examining them. In this regard, the Committee cannot accept the State party's argument in favour of inadmissibility based on communication No. 168/1984 (*V.Ø. v. Norway*) insofar as that complaint submitted to the Committee had been declared manifestly ill-founded by the European Commission of Human Rights, and not incompatible *ratione materaie*.

6.5 The Committee also notes that the European Court considered that the provisions of the European Convention which had been breached, according to the author in his complaints relating to violation of the right to free elections, the right to an effective remedy, and discrimination based on political opinions, were applicable, and examined all the points of fact and of law which arose in the case in question. Having examined all the aspects of the question in a thorough and exhaustive manner, the Court declared these complaints inadmissible because they were manifestly ill-founded.

6.6 Regarding the author's argument that the provisions of Protocol No. 1 to the European Convention relating to the right to free elections are different from those of the Covenant as cited in the case in question, the fact that there are differences in wording between the provisions is not in itself sufficient to justify the conclusion that a question which is raised as a matter protected under the Protocol was not considered by the European Court. Evidence must be supplied of a substantial difference between the applicable provisions in the case in question. In the matter at hand, the provisions of article 3 of the Protocol as interpreted by the Court are sufficiently close to those of article 25 of the Covenant as cited in Mr. Masson's communication for the relevant issues to be deemed to have been considered.[2]

6.7 It follows that the communication has been considered by another international body as regards the complaints relating to the right to free elections and political opinions. Regarding the right to an effective remedy, the Committee notes that the European Court declared this grievance manifestly ill-founded insofar as the other grievances had been declared inadmissible.

6.8 Lastly, it is apparent that Mr. Masson's communication was considered by another international body in respect of the complaints concerning violations of article 14, paragraph 1 (complaint that the Constitutional Council's decision was partial and political in nature), and article 25 of the Covenant. Consequently, subparagraph (a) of the State party's reservation concerning the Optional Protocol is applicable, and the Committee cannot consider these aspects of Mr. Masson's communication.

6.9 In relation to the other complaints under article 14, paragraphs 1, 3 (a) and (b), 5 and 7; article 15, paragraph 1; article 17, paragraph 1; and article 2, paragraphs 3 (a) and (b), of the Covenant, the Committee considers that as these matters were not considered by the European Court - and, in the case of some of them, namely those under articles 14, 3 (b) and 17, not raised by the applicant - they cannot be covered by France's reservation and must be examined together with the complaints of Ms. Zimmermann and Mr. Crippa.

6.10 In relation to Ms. Zimmermann, the Committee took note of the State party's argument that her communication was inadmissible on the grounds that she did not have the status of victim of a violation of the Covenant. The Committee also noted the author's arguments to the effect that, as a substitute deputy, she had been affected by the annulment of Mr. Masson's election. The Committee considers that in spite of the fact that she was affected by the decision of the Constitutional Council, Ms. Zimmermann cannot be considered as a victim of a violation of the Covenant. The decision of the Constitutional Council did not ignore her right to stand for election, and indeed, she was elected as a deputy when new parliamentary elections were organized. Accordingly, the author's complaint must be declared inadmissible under article 1 of the Optional Protocol.

6.11 Concerning Mr. Crippa, in respect of the first part of his communication relating to article 14, paragraphs 1, 3 (a) and (b), 5 and 7, and article 15, paragraph 1, of the Covenant, a complaint also covering that of Mr. Masson, the Committee considers that the case in question, as it deals with the regularity of the electoral dispute, neither constitutes a determination, nor can it be addressed within the framework of a criminal charge. The Committee therefore declares these claims incompatible *ratione materiae* with the provisions of the Covenant under article 3 of the Optional Protocol.

6.12 In relation to the complaint of violation of article 17, paragraph 1, of the Covenant raised by Mr. Crippa and accepted in respect of Mr. Masson, the Committee, after having examined the State party's argument and the authors' claim of an attack on their honour through the annulment of their election and, for the two candidates Mr. Crippa and Mr. Masson, their disqualification for a year, considers that, bearing in mind the circumstances of the case, the elements presented by the applicants are not sufficiently substantiated and hence do not support the admissibility of the complaints under article 2 of the Optional Protocol.

6.13 Concerning the alleged violation of article 25 of the Covenant raised by Mr. Crippa, the Committee, having taken note of the State party's arguments and the authors' assertion that the Constitutional Council's ruling represents a violation of the right to be elected and to organize an election campaign freely, recalls its jurisprudence on this matter under article 25 of the Covenant, namely that the right to vote and to be elected is not an absolute right, and that restrictions may be imposed on it provided they are not discriminatory or unreasonable.[3] The Committee considers that the authors have not substantiated the elements of their complaint in respect of the restrictions placed on their right to be elected, which are alleged to be contrary to article 25 of the Covenant, and therefore declares their complaint to be inadmissible under article 2 of the Optional Protocol.

7. The Committee therefore decides:

(a) That the communications are inadmissible under articles 1, 2, 3 and article 5, paragraph 2 (a), of the Optional Protocol;

(b) That this decision shall be communicated to the State party and to the authors.

[Adopted in English, French and Spanish, the French text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the Committee's annual report to the General Assembly.]

Notes

[1] Communication No. 75/1980, *Dulio Fanali v. Italy*, Views of 31 March 1983, para. 13.

[2] Communication No. 808/1998 (*Georg Rogl v. Germany*), decision of 25 October 2000, para. 9.4.

[3] Communications No. 500/1992, *J. Debreczeny v. Netherlands*; No. 44/1979, *Alba Pietraroia on behalf of Rosaria Zapala v. Uruguay*; No. 932/2002, *Gillot v. France*; general comment No. 25 relating to article 25 (fifty-seventh session, 1996).

B. Communication No. 1012/2001, *Burgess v. Australia*

(Decision adopted on 21 October 2005, eighty-fifth session)[*]

Submitted by:	Mr. Brian John Lawrence Burgess (represented by Mauro Gagliardi and Fred John Ambrose of the International Federation of Human Rights)
Alleged victim:	The author and his wife, Mrs. Jennefer Anne Burgess, and their children, Dustin, Luke and Malia Burgess
State party:	Australia
Date of communication:	13 July 2001 (initial submission)
Subject matter:	Deportation; family separation
Procedural issues:	Admissibility ratione personae, exhaustion of domestic remedies
Substantive issues:	Psychological torture, unlawful and arbitrary interference with the family unit, protection of the family, equal protection of the law
Articles of the Covenant:	2, 3, 5, 7, 9, 10, 12, 13, 14, 16, 17, 23, 24 and 26
Articles of the Optional Protocol:	1 and 5, paragraph 2 (b)

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 21 October 2005,

Adopts the following:

Decision on admissibility

1.1 The author of the communication is Brian John Lawrence Burgess, a British citizen born in England in 1952, residing in Australia from 1969 to 10 July 2000, date of his deportation from

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[*] The following members of the Committee participated in the examination of the present communication: Mr. Nisuke Ando, Mr. Prafullachandra Natwarlal Bhagwati, Mr. Alfredo Castillero Hoyos, Mr. Maurice Glèlè Ahanhanzo, Mr. Edwin Johnson, Mr. Walter Kälin, Mr. Ahmed Tawfik Khalil, Mr. Rajsoomer Lallah, Mr. Michael O'Flaherty, Ms. Elisabeth Palm, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Hipólito Solari-Yrigoyen, Ms. Ruth Wedgwood and Mr. Roman Wieruszewski.

Pursuant to rule No. 90 of the Committee's rules of procedure, Committee member Mr. Ivan Shearer did not participate in the adoption of the present decision.

Australia to the United Kingdom. The author is represented by counsel Mauro Gagliardi and Fred John Ambrose of the International Federation of Human Rights, who submitted an authorization from the author to act on his behalf.

1.2 By letter of 17 July 2001, the author submitted a request for interim measures to allow him to return to the State party and to avoid irreparable damage to him and his family. The request was denied by the Committee's Special Rapporteur on new communications on 18 July 2001.

1.3 On 17 August 2001, counsel included also the author's wife, Jennefer Anne Burgess, an Australian citizen born in 1949, and their children Dustin, born in Australia on 29 March 1983, Luke and Malia, twins born in Australia on 27 April 1985, all still residing in Australia. However, counsel did not submit an authorisation neither from the author nor from the author's wife and children to act on behalf of them.

1.4 Counsel claim that the members of the family are victims of violations by Australia[1] of articles 2, 3, 5, 7, 9, 10, 12, 13, 14, 16, 17, 23, 24 and 26 of the International Covenant on Civil and Political Rights (the Covenant).

Factual background

2.1 On 2 September 1969, at age 17, the author migrated to Australia under the British Boy's Movement for Australia, and was granted a permanent resident's visa. In the early 1970's, he married Jennefer Anne Burgess and they had three children.

2.2 In the beginning of July 1996, the author was arrested. On 24 October 1996, he was convicted of two charges of "import of trafficable quantity of prohibited drug (cocaine)", and sentenced to imprisonment for a term of seven years with a non parole period of four years, on each charge, to be served concurrently. While in prison, the author participated in a work release programme in preparation for his release.

2.3 On 27 March 1998, Mr. Burgess was sent a Notice of intention to cancel his visa by the Department of Immigration. On 16 March 2000, after an interview in relation to this notice, Mr. Burgess' visa was cancelled by the Minister under section 501 (2) of the Migration Act 1958[2] (the Act), on the grounds that he had a "substantial criminal record" under section 501 (6) (a)[3] of the Act, and consequently failed to pass the character test. If a person is deemed to fail the character test, discretion must be exercised by the Minister, who must evaluate primary and other considerations such as the protection of the Australian community, the best interests of the child etc. The Minister's decision was based on a report prepared by the case officer in accordance with the Act. This report listed the principal factors to be taken into account by the Minister while deciding on the author's case, and concluded that the only factor in favour of cancellation of the author's visa was the serious nature of his offence. Factors against cancellation were the assessment of the risk of recidivism as low and the considerable hardship that the children, his wife and the author would suffer if Mr. Burgess' visa was cancelled and he was removed to the United Kingdom.

2.4 On 14 April 2000, the author was notified of the cancellation of his visa by the Department of Immigration and Multicultural Affairs. The notice indicated that "because the Minister decided your case personally, you are excluded from appealing this decision to the

Administrative Appeals Tribunal. However, you may wish to seek further legal advice as to other avenues of legal review which may be available to you".

2.5 On 27 April 2000, the Minister declined to reconsider his decision of 16 March on the basis that section 501 (2) does not incorporate a power to revisit decisions made under it. On 5 July, the author applied to the Federal Court for review of the Minister's "decision" of 27 April. The application was dismissed on 10 July on the grounds that it was not a "decision", as the Minister has no power to review a decision made pursuant to section 501 (2) of the Act.

2.6 On 10 July 2000, Mr. Burgess was released on parole, and on the same day, was removed to the United Kingdom, after living more than thirty years in the State party. On 23 August 2001, he lodged, through his wife, an application for a spouse-sponsored visa, which was denied.

2.7 With regard to the requirement of exhaustion of domestic remedies, the author contends that he has exhausted available remedies.

2.8 The author states that he has submitted a complaint to the European Court of Human Rights, but the complaint before that Court is directed against the United Kingdom only.

The complaint

3.1 The author claims that his deportation to the United Kingdom deprives him of living in the country that has been his home for all his adult life. In addition, he contends that the family unit has been divided as his deportation results in a permanent separation from his wife and children, who have stayed in Australia and cannot visit him due to financial reasons.

3.2 The author further alleges a violation of his Covenant rights because he considers that the decision of the Minister was arbitrary and an abuse of his discretion, as it was taken in disregard of the recommendations of the case officer who prepared the report on his case.

3.3 He claims that his deportation amounts to psychological torture, both for him, his wife and children. He argues that during the period of his sentence, he was provided with day release and weekend release, time which he spent solely with his family. During this period, his children were led to believe that this was a process of reconciliation with the family, but it was not. He also points out that he was not permitted to say a farewell to his family before his removal.

3.4 The author claims to be the victim of inequality, as expulsion orders which are not signed directly by the Minister can be appealed to the Administrative Appeals Tribunal, while he was denied such opportunity, as the Act provides that deportation orders signed by the Minister are "non-appealable". In addition, the author claims that as a British citizen who arrived in 1969, he falls into a category, defined by the High Court in its *Patterson* ruling[4], of individuals who cannot be deported because they cannot be considered as "aliens" for the purposes of the

Australian constitution and are therefore not subject to the Migration Act. The author considers that he was treated unequally compared to other individuals who arrived prior to 1973, and whose deportation orders were cancelled by the High Court for this reason.

3.5 Finally the author contends that he has been punished twice for the same offence.

The State party's submission on the admissibility and merits of the communication and author's comments

4.1 On 11 March 2002, the State party commented on the admissibility and merits of the communication. It submits that the entire communication is inadmissible ratione personae in so far as it purports to be lodged on behalf of Mrs. Burgess and the Burgess children, as they have not given their authority to act on their behalf. It points out that "there is no evidence that either Mrs. Burgess or any of the Burgess children have expressly authorized counsel to act on their behalf. In relation to the Burgess children, there is no evidence that either Mr. or Mrs. Burgess authorized the representatives to act on behalf of any of the Burgess children who do not have the capacity to provide such authorisation themselves (although on this point Australia notes that the age of the three children means that they are likely to be able to provide consent on their own behalf, should they wish to). It underlines that for the communication to be admissible in relation to Mrs. Burgess and the three children, counsel should have provided evidence:

- That Mrs. Burgess and either Mr. or Mrs. Burgess on behalf of the children or any of the children personally has authorized counsel to act on their behalf; or
- That counsel have a sufficient close relationship with Mrs. Burgess and the children to justify them acting without express authorisation, and that the circumstances of the case require this.

The State party contends that counsel provided no such evidence, although they were fully aware of this requirement, as they did submit such an authorisation on behalf of Mr. Burgess.

4.2 The State party further considers that the communication is inadmissible for failure to exhaust domestic remedies in relation to the decision to cancel the author's visa and his removal to the United Kingdom. It argues that the author incorrectly asserts that the decision of the Minister to cancel the author's visa and to remove him was "non-appealable", and that although the decision could not have been reviewed by the Administrative Appeals Tribunal, its legality could have been challenged in the Federal Court or the High Court of Australia. These remedies were available, known to the author and his advisers and would have provided an effective remedy to any defects in the decision made by the Minister. However, the author failed to pursue these appeals within the statutory time lines set out in the Migration Act.

4.3 In addition, the author could have availed himself of constitutional remedies such as seeking the judicial review of the Minister's decision by the High Court in its original jurisdiction, seeking leave to commence an action in the High Court challenging the decision to cancel his visa and his removal from Australia, and bringing an action for *habeas corpus* against Australia in the High Court. It has not been demonstrated that these remedies were not available or would have been ineffective.

4.4 The State party submits that, with the exception of the allegation of a violation of article 9, paragraph 1, in relation to Mr. Burgess, all of the allegations contained in the communication are inadmissible under article 3 of the Optional Protocol in that they are incompatible with the provisions of the Covenant. A number of the allegations are inadmissible under article 1 of the Optional Protocol in relation to certain members of the family as they cannot be considered victims of the alleged violations. Finally, the State party submits that the entire communication is inadmissible under article 2 of the Optional Protocol for failure to substantiate any of the allegations.

4.5 On the merits, the State party argues that the allegations are without merit as the evidence provided is not specific, pertinent and sufficient to permit the examination of the merits of the alleged violations. As to a possible violation of article 7 and the allegations of "psychological torture", the State party submits that the author was informed that he would be removed from Australia upon his release from prison approximately three months before the release, and that he had visitation rights during this period. Furthermore, he was aware that he would not be in the public contact area of the airport prior to departure. He therefore had the opportunity to say farewell to his family in prison well before his release. With regard to the claim that the author's deportation constitutes "psychological torture", the State party argues that its treatment of the Burgess family did not include any of the elements of torture, i.e. the intent, fulfilment of a certain purpose and/or the intensity or severe pain, and that the treatment was reasonable and in accordance with the State party's immigration laws. On the issue of removing the author from Australia, after permitting him to have day and week-end access visits with his family, the State party submits that all of the author's rights as a prisoner were respected; this does not amount to a violation of article 7.

4.6 On the alleged violation of article 9, the State party submits that the author's treatment was in accordance with procedures established by law (the Migration Act), and that his removal resulted directly from his status as an unlawful non-citizen pursuant to article 189 of the Act. The policy of detaining unlawful non-citizens pending removal is reasonable, necessary and proportionate to the ends sought, and the author was not subject to arbitrary detention. The Minister's decision was not contrary to the recommendation of department officials, as the briefing to the Minister referred to by the author did not contain any recommendation. Finally, it submits that its migrations laws are not arbitrary per se, and that they were not enforced in an arbitrary manner in the case of the author.

4.7 On article 10, the State party indicates that the communication does not assert that the author has been detained. It underlines that he was detained for approximately one hour at the airport prior to boarding his flight, and that he was treated humanely during this period.

4.8 In relation to article 12, paragraph 1, the State party notes that the author was not lawfully in Australia at the time of his removal, as he had become an unlawful non-citizen due to the lawful cancellation of his visa. The operation of article 12, paragraph 3, which establishes a number of exceptions to the rights established by article 12, paragraph 1, including restrictions "which are provided by law", means that the author's detention and removal fall within the scope of this provision. With regard to article 12, paragraph 4, the State party considers that the author's link with Australia does not possess the characteristics required for him to be able to assert that this is his country for the purposes of this provision. In particular, his situation does not give rise to the special ties and claims as described in the case of *Stewart against Canada*.[5]

4.9 On article 13, the State party submits that the author was not lawfully in Australia at the time of his removal to the United Kingdom, that the decision to expel him was made in accordance with Australian law and that he had the opportunity to have this decision reviewed.

4.10 With regard to article 14, the State party notes that the author does not assert that his arrest or imprisonment in relation to importing drugs amounted to a violation of any of the rights guaranteed by the Covenant. It further emphasises that a decision relating to the right of an alien to remain in the territory of a State party does not fall within the ambit of article 14, paragraph 1, as such proceedings involve neither the determination of a criminal charge nor the determination of "rights and obligations in a suit of law". The author was afforded due process in relation to the decision to cancel his visa and points out that the allegation that the Minister's decision was not subject to appeal is incorrect, as he was able to seek review of the legality of this decision in either the Federal Court or the High Court.

4.11 On the alleged violation of article 17, the State party submits that requiring one member of a family to leave Australia while the other members are permitted to remain, does not necessarily involve an "interference" with the family life or either of the person removed or those who remain. It submits that article 17 is aimed at protecting individual privacy and the interpersonal relationships within a family. The author's removal was not aimed at affecting the relationships between members of the family. The fact that the family cannot be together in Australia at this point of time does not in itself amount to an interference, and decisions about whether the other family members will continue their lives in Australia or travel elsewhere to be with the author are for them to make. The State party argues that if the author's removal is found by the Committee to amount to interference, such interference would be neither "unlawful" nor "arbitrary". The removal was made in accordance with domestic law. The State party refers to its submissions on article 9 and provides detailed explanations in support of its submission that the Burgess family was not subject to arbitrary interference, but rather was subject to treatment that is reasonable, necessary, appropriate, predictable and proportional to the ends sought, given the circumstances.

4.12 The State party argues that article 23, paragraph 1, does not prevent the detention and removal of an illegal alien in accordance with Australian domestic laws. Australia's obligations in relation to protecting the family do not mean that it is unable to remove an illegal alien from Australia just because that person has established a family with Australian nationals. Article 23 must be read in light of the State party's right, under international law, to control the entry, residence and expulsion of aliens. The State party adds that the author's removal came about because of the seriousness of his criminal conduct in Australia, and that its actions constitute reasonable steps to ensure the integrity of its immigration programme and to protect Australian society from the effects of prohibited drugs. The situation arose because of the author's own conduct, rather than a failure by Australian authorities to protect the family unit.

4.13 In relation to article 26, the State party indicates that it assumes that the alleged violation of article 26 is an alleged violation of the guarantee of equality before the law in relation to the decision to cancel the author's visa. The State party refers to its submissions on article 9 and argues that the decision to cancel the author's visa was not arbitrary, but reasonable and necessary, appropriate, predictable and proportional to the ends sought, which is demonstrated by the following factors:

- The author's treatment was in accordance with procedures established by domestic law;

- The clear failure of the character test, required under section 501 of the Migration Act due to the nature of his criminal record, meant that it was reasonable and predictable that his visa would be cancelled notwithstanding that he had established a family in Australia;

- The decision was based on a full consideration of all relevant issues, including the author's criminal record, his conduct since arriving in Australia, the interests of protecting Australian community from prohibited drugs, the expectations of the Australian community, the deterrent effect of a decision to cancel the author's visa for other non-citizens who may engage in criminal conduct, the interests of Mrs. Burgess and the Burgess children and Australia's international obligations.

4.14 As to violations of articles 2, 3, 5, 14, paragraphs 2 to 7, 16, 23, paragraphs 2 to 4, and 24, the State party provides detailed arguments dismissing these claims as either inadmissible or unmeritorious.

5. On 8 June 2004, counsel informed the Committee that they had no comments on the State party's observations.

Issues and proceedings before the Committee

Consideration of admissibility

6.1 Before considering any claim contained in a communication, the Human Rights Committee must, in accordance with rule 93 of its rules of procedure, decide whether or not the communication is admissible under the Optional Protocol to the Covenant.

6.2 The Committee has ascertained that the same matter is not being examined under another procedure of international investigation or settlement for purposes of article 5, paragraph 2 (a), of the Optional Protocol.

6.3 On the question of standing, the Committee notes the State party's contention that the communication should be declared inadmissible ratione personae with respect to Mrs. Burgess and the three children. It appears from a reading of the file that after receiving the initial submission, the Secretariat asked counsel, on 19 July 2001, in the following terms, "to provide (…) written authorisation from Mr. Burgess himself and from his family members if you also wish them to appear as victims". On 26 July, counsel submitted an authorisation to act on behalf of Mr. Burgess only.[6] The Committee notes that the authors' representatives have submitted an authorisation to act on behalf of Mr. Burgess only, but that in August 2001 they included Ms. Burgess and the children in the communication without any authorisation. It further notes that counsel did not wish to comment on the State party's observation that they had no standing to represent Mrs. Burgess and the children. There is nothing in the file before the Committee in respect of the claims brought on behalf of Mrs. Burgess and the children to show that Mrs. Burgess either authorized counsel to represent her, or that Mr. or Mrs. Burgess or their children have authorized counsel to represent the children. The Committee considers that counsel has no standing before the Committee with respect to Mrs. Burgess and Dustin, Luke and Malia Burgess and consequently declares the part of the communication alleging violations of their rights inadmissible under article 1 of the Optional Protocol.

6.4 With regard to the State party's observation that the author has failed to exhaust domestic remedies, because the author failed to appeal the decision of the Minister to cancel his visa to the Federal Court or the High Court of Australia within the statutory time lines set out in the Migration Act, and in the absence of any comments by the author on availability and the effectiveness of these remedies in this particular case, the Committee considers that the author has not exhausted these domestic remedies invoked by the State party and that the communication is accordingly inadmissible under article 5, paragraph 2 (b), of the Optional Protocol.

7. The Committee therefore decides:

(a) That the communication is inadmissible under articles 1 and 5, paragraph 2 (b), of the Optional Protocol;

(b) That this decision will be communicated to the author and to the State party.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently to be issued in Arabic, Chinese and Russian as part of the Committee's annual report to the General Assembly.]

Notes

[1] The International Covenant on Civil and Political Rights and its Optional Protocol entered into force for the State party respectively on 13 November 1980 and 25 December 1991.

[2] Section 501 (2) of the Act stipulates that "The Minister may cancel a visa that has been granted to a person if:

(a) The Minister reasonably suspects that the person does not pass the character test; and

(b) The person does not satisfy the Minister that the person passes the character test."

[3] Section 501 (6) (a) stipulates that "a person does not pass the character test (inter alia) if:

(a) The person has a substantial criminal record (as defined by subsection (7))".

(b) According to subsection 7, "a person has a substantial criminal record (inter alia) if:

(c) **The person has been sentenced to a term of imprisonment of 12 months or more, or**

(d) **The person has been sentenced to 2 or more terms of imprisonment (whether on one or more occasions) where the total of those terms is 2 years or more".**

[4] Counsel refers to the ruling of the High Court of Australia of 6 September 2001 (Re: *Patterson*; Ex parte Taylor S165/2000).

[5] The State party refers to communication No. 538/1993, *Charles Stewart v. Canada*, Views adopted on 1 November 1996.

[6] The authorisation, dated 1 February 2001, reads as follows: "I, Brian John Lawrence Burgess, (…) do hereby appoint and authorize Mauro Gagliardi and Fred John Ambrose, of the International Federation of Human Rights, (…) to represent and undertake on my behalf any and all claims and assertions of violations of the rights secured to me under and pursuant to the various United Nations Covenants and Articles (…) with respect to actions taken against me by the government of Australia (…)."

C. Communication No. 1030/2001, *Dimitrov v. Bulgaria* (Decision adopted on 28 October 2005, eighty-fifth session)*

Submitted by:	Mr. Dimitar Atanasov Dimitrov (not represented by counsel)
Alleged victim:	The author
State party:	Bulgaria
Date of communication:	3 September 2001 (initial submission)
Subject matter:	Refusal of administrative body to approve nomination for professorship
Substantive issues:	Qualification of application for academic title and review procedure as a "suit at law"
Procedural issues:	Admissibility *ratione materaie*.

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 28 October 2005,

Adopts the following:

Decision on admissibility

1.1 The author of the communication is Dimitar Dimitrov, a Bulgarian citizen. Although the author does not invoke any specific provision of the Covenant, the communication appears to raise issues under articles 2 and 14, paragraph 1, of the Covenant. He is not represented by counsel.

1.2 The Covenant and the Optional Protocol entered into force for Bulgaria on 23 March 1976 and 26 June 1992 respectively.

Factual background

2.1 The author is an associate professor of physical education at the University of Forestry in Sofia. He holds a doctoral degree and has taught extensively in Bulgaria and abroad. In

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* The following members of the Committee participated in the examination of the present communication: Mr. Nisuke Ando, Mr. Prafullachandra Natwarlal Bhagwati, Mr. Alfredo Castillero Hoyos, Mr. Maurice Glèlè Ahanhanzo, Mr. Edwin Johnson, Mr. Walter Kälin, Mr. Ahmed Tawfil Khalil, Mr. Rajsoommer Lallah, Mr. Michael O'Flaherty, Ms. Elisabeth Palm, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Ivan Shearer, Mr. Hipólito Solari-Yrigoyen, Ms. Ruth Wedgwood and Mr. Roman Wieruszewski.

May 1997, he entered a "competition" advertised by the University for the title of "Professor in the Theory and Methods of Teaching Physical Education and Athletic Training".

2.2 The author's application was considered by the Specialised Science Council (SSC) of the Higher Attestation Commission (HAC), which supported his candidacy and nominated him for the title of professor to the Scientific Commission of the HAC. At its meeting of 18 May 1998, the Scientific Commission supported the author's nomination and forwarded it for confirmation to the Presidium of the HAC. The Presidium reports to the Bulgarian Council of Ministers and is authorized formally to confer academic degrees and titles of academic rank in accordance with the Scientific Degrees and Scientific Titles Act (Act).

2.3 On 18 June 1998, the Presidium initiated "control proceedings" under article 27 of the Act, which allows the Presidium to return a nomination if it deviates significantly from the criteria established by the Presidium under article 34 of the Act. The Presidium returned the nomination to the Scientific Commission, requesting further information about the quality of the author's work. On 5 October 1998, the Scientific Commission re-examined the case and confirmed its earlier decision to nominate the author, and again forwarded it to the Presidium for confirmation. The Presidium reinstated control proceedings, returning the nomination to the Scientific Commission, on this occasion requesting further information about the author's course. The Scientific Commission re-examined the nomination for a third time on 30 June 1999, and again confirmed its earlier decision to support the nomination and again forwarded it to the Presidium.

2.4 On 8 July 1999, the Presidium rejected the author's application for the title of professor, without giving reasons. Article 27 of the Act states that, where control proceedings have been reinstated, the Presidium may disregard any recommendation of the Scientific Commission and decide at its own discretion whether to award the title of professor or not.

2.5 The author contends that the Presidium's review of his application did not comply with the Act, and that there was no basis to require the submission of further information in support of his candidacy. He urges that the Presidium failed to identify any procedural or administrative irregularities in his nomination which would have entitled it to reject the nomination. He argues that, instead of providing reasons for its decision to reject his candidacy, the Presidium chose to use the mechanism provided for under article 27 of the Act, under which it may determine the matter at its own discretion without giving reasons.

2.6 The author appealed the decision of the Presidium to the Supreme Administrative Court (the SAC). However, on 9 November 2000, the SAC struck out the claim as under article 27 of the Act, a decision of the Presidium to determine an application following the reinstatement of a control proceeding is not subject to judicial review. The author appealed to a five member panel of the SAC; however on 29 December 2000 his appeal was dismissed.

The complaint

3. The author contends that the Presidium refused to confer on him the academic rank of professor in a biased manner without providing any arguments or taking into consideration the views of competent professional scientific commissions. The author claims that his rights have been violated, without referring to any particular provisions of the Covenant.

The State party's observations on admissibility

4.1 By note verbale of 22 January 2002, the State Party submits that the communication is inadmissible under articles 2 and 3 of the Optional Protocol. It defends the actions of the Presidium as being entirely within its jurisdiction, as set out in the Act.

4.2 The State party points out that the author does not claim to be a victim of a violation of any right enumerated in the Covenant, and that the only provisions which might be at issue are article 2, paragraph 3 (a), and article 14, paragraph 1. In relation to the latter, the State party submits that the article is inapplicable in cases which confer discretionary powers on public or judicial authorities, such as the discretion conferred on the Presidium in the present case. It notes that the decisions of the Presidium are not subject to judicial control, given its nature as an expert body. Article 14, paragraph 1, applies to the administration of justice in procedures which determine the rights and obligations of an applicant in a suit at law. In the present case, there is no such suit at law. The author had no "right" to a scientific title, nor was there any corresponding obligation on the Presidium to confer such title. In the current case, the Presidium sought further information about the author's work and course and lectures. At its meeting on 8 July 1999, since it had reinstated the control proceedings, the Presidium availed itself of its legal discretion to determine the application itself, on the basis of the information before it.

4.3 In relation to article 2, paragraph 3, the State party submits that the communication does not refer to any right enumerated in the Covenant, and that in any event article 14, paragraph 1, is inapplicable in the case. Accordingly, article 2, paragraph 3 (a), which can only arise in connection with a breach of another substantive right, cannot be invoked. In the circumstances, the State party submits that the claim is unsubstantiated and incompatible with the provisions of the Covenant, and therefore inadmissible. It adds that the communication is manifestly unfounded and should also be considered inadmissible as an abuse of the right of submission, under article 3 of the Optional Protocol.

Authors' comments on the State party's observations

5.1 In his comments on the State party's submission dated 20 March 2002, the author argues that, although article 34 of the Act requires specific criteria for the award of title of professor, no such criteria have in fact been developed. According to him, rules issued under the Act state that there is a requirement simply for 'minimal pedagogical activity, as determined by the government': there is no requirement for a particular course or lectures. The rules specify that applications may be received from candidates, regardless of whether they have performed any educational-pedagogical activity. The author affirms that the quality of his work had been confirmed by three professorial reviewers. In light of the above, the author submits that the Presidium had no basis for requiring further information in relation to the quality of his work and course of lectures, or for instituting the two control proceedings. The author claims that the unmotivated refusal of the Presidium, without giving reasons, to confirm the title of professor calls into question its objectivity.

5.2 The author acknowledges that, under the Act, the Presidium may reinitiate control proceedings where the decision of the Scientific Commission deviates significantly from the established criteria. However, he contends that, as there are no published criteria, the Presidium's proper role is limited to reviewing the procedure for the conferral of the title of professor. The substance of the application was a matter for the SSC and the Scientific

Commission to determine, which had already nominated him for the title of professor. As the Presidium did not identify any procedural defects, there was no basis for it to initiate or to reinstate control proceedings.

5.3 The author reiterates that his "civil rights" were violated because, under the Act, the Presidium enjoyed an unlimited right to determine his application, despite the support of his candidature by the SSC and the Scientific Commission. He states that no member of the Presidium is a specialist in the field of physical education and doubts that an expert decision could have been taken in these circumstances.

5.4 The author submits that decisions of the Presidium are an administrative act and should be subjected to judicial control. He affirms that he was denied the confirmation of his professorial appointment without reasons. As to the State party's argument that he had no "right" to be confirmed as a professor, the author points to the fact that the Scientific Commission had endorsed his candidature three times.

State party's submission on the merits

6.1 On 2 September 2002, the State party submitted its observations on the merits of the communication. It notes that, in his comments on the State party's submission on admissibility, the author again failed to specify any relevant right guaranteed under the Covenant which he considered to have been violated: the State party reiterated its view that the communication was inadmissible under articles 2 and 3 of the Optional Protocol.

6.2 The State party contests the author's argument that there are no specific requirements against which the Presidium could review the nomination for the title of professor. Article 14 of the Act explicitly provides that the academic title of professor may only be conferred if the candidate has a defined minimum of pedagogic activity, the length of which is to be determined by regulations. According to the State party, the relevant minimum was specified as a permanent course of lectures of 45 hours per academic year, given to specialists: however, the author had in fact been giving courses of lectures to non-specialists. Accordingly, he did not fulfil one of the legal criteria for conferring on him the academic title of professor. The State party adds that, under the relevant rule, advertisements for a professorship are open to all candidates regardless of when, not regardless of whether, they have conducted pedagogic activities.

6.3 The State party refutes the author's argument that neither the Act nor the Presidium lack defined criteria. The Act itself contains a range of criteria, which the Presidium applied. Further, article 34 (b) of the Act states that the Presidium is to "concretise the criteria for the conferring of academic degrees and titles in the different fields of science". The Presidium does not have an obligation to develop and to publish criteria, but simply to specify in every concrete field of science the parameters of application of the general criteria established by the Act and its rules.

6.4 The State party disputes the author's submission that, because the decisions of the Presidium are administrative, they should be subject to a right of challenge before the SAC. Under article 120 of the Constitution of Bulgaria, individuals may challenge all administrative acts affecting their legal interests, with the exception of those for which the law expressly provides otherwise. Such an exception is provided for in article 27 of the Act, which is entirely justified in view of the specific competence with which the Presidium is endowed under the law.

The Presidium is a collective scientific administrative body exercising power in respect of the conferring or refusal of academic degrees and titles. Courts do not possess the relevant specialized knowledge to supervise this process; accordingly, it would be inappropriate for such decisions to be subjected to judicial review.

6.5 Finally, the State party notes that the SAC has established that the Presidium is not under an obligation to issue reasons for its decision. Even if reasons were required to be issued, the Court would not be in a position to evaluate them.

Author's comments on the State party's merits submissions

7.1 On 20 January 2003, the author points out that the Scientific Commission in fact comprised the most relevant educated specialists in his field, rather than the Presidium, and reiterates that his nomination for the title of professor was not affected by any procedural error which would have warranted the Presidium rejecting his nomination. He states that he remains unaware why the Presidium ignored the decisions of the Scientific Commission and took a negative view of his case, when, in his view, all relevant requirements had been met.

7.2 The author affirms that proceedings before the Presidium are conducted behind closed doors, without the right of representation. He did have the right to appear before the SAC, but the court refused to deal with his case in substance. He contests the State party's claim that there are in fact current and valid requirements in relation to the minimum number of lecturing hours, and contends that those referred to by the State party are no longer valid.

Issues and proceedings before the Committee

8.1 Before considering any claim contained in a communication, the Human Rights Committee must, in accordance with rule 93 of its Rules of Procedure, decide whether or not it is admissible under the Optional Protocol to the Covenant.

8.2 The Committee has ascertained, as required under article 5, paragraph 2 (a), of the Optional Protocol, that the same matter is not being examined under another procedure of international investigation or settlement. It further considers that all available domestic remedies have been exhausted.

8.3 To the extent that the author's communication raises issues under article 14, paragraph 1, the Committee recalls its jurisprudence that the concept of "suit at law" is based on the nature of the relevant right in question. The Committee has noted the State party's submission that the author has not identified which rights in a suit at law he claims to have been infringed. It recalls its views in the case of *Kolanowski v. Poland*, where it considered that the author's unsuccessful bid to be appointed to a civil servant position and his efforts to contest the rejection of his bid for promotion did not constitute determination of rights and obligations in a suit at law. In the present case, the author does not seek promotion, but merely conferral of an academic title. His application was assessed in accordance with the relevant procedures laid down under Bulgarian law, namely, the Scientific Degrees and Scientific Titles Act and the highest administrative body vested with discretion to determine the merits of the application rejected. There is no information before the Committee to show that the author had any right to have the title of professor conferred on him or that the Presidium was under any obligation to endorse his candidature. In these circumstances, and in the absence of any other information as to the effect of the Presidium's decision on the author, the Committee concludes that the refusal of the Presidium to confer the title of professor on him did not constitute a determination of any of his rights in a suit at law. Consequently, the claim made by the author in the communication under article 14, paragraph 1, is inadmissible *ratione materaie*, under article 3 of the Optional Protocol.

8.4 The Committee has noted that the State party has invoked article 2, in its observations. The Committee recalls its constant jurisprudence that this article operates only in conjunction with other substantive provisions in the Covenant. In light of the above conclusions relating to the applicability of article 14, paragraph 1, a claim under article 2, paragraph 3, cannot be sustained and is thus inadmissible.

9. The Human Rights Committee therefore decides:

(a) The communication is inadmissible under articles 2 and 3 of the Optional Protocol;

(b) This decision shall be transmitted to the State party and to the author.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the Committee's annual report.]

D. Communication No. 1034-1035/2001, *Dusan Soltes v. Czech Republic & Slovakia* (Decision adopted on 28 October 2005, eighty-fifth session)*

Submitted by:	Mr. Dusan Soltes (not represented by counsel)
Alleged victim:	The author
States parties:	The Czech Republic and the Slovak Republic
Date of communication:	17 July 2000 (initial submission)
Subject matter:	Attempt of salary recovery from national authorities by former international civil servant
Procedural issues:	Exhaustion of domestic remedies
Substantive issues:	Effective remedy; trial before impartial and independent tribunal
Articles of the Covenant:	2, 14 and 26
Articles of the Optional Protocol:	2 and 5, paragraph 2 (b)

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 28 October 2005,

Adopts the following:

Decision on admissibility

1.1 The author of the communication, initially dated 17 July 2000, is Mr. Dušan Šoltés, a Slovakian citizen, born in 1943. He claims to be a victim of violations by both the Czech Republic and the Slovak Republic of articles 2, 14, and 26 of the International Covenant on Civil and Political Rights. He is not represented by counsel.[1]

1.2 On 13 April 2004, the Committee's Special Rapporteur on new communications decided to separate the consideration of the admissibility and merits of the communication.

1.3 Pursuant to Rule 94 of Rules of Procedure, the Committee has joined consideration of cases 1034/2001 and 1035/2001.

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* The following members of the Committee participated in the examination of the present communication: Mr. Nisuke Ando, Mr. Prafullachandra Natwarlal Bhagwati, Mr. Alfredo Castillero Hoyos, Mr. Maurice Glèlè Ahanhanzo, Mr. Edwin Johnson, Mr. Walter Kälin, Mr. Ahmed Tawfik Khalil, Mr. Rajsoomer Lallah, Mr. Michael O'Flaherty, Ms. Elisabeth Palm, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Ivan Shearer, Mr. Hipólito Solari-Yrigoyen, Ms. Ruth Wedgwood and Mr. Roman Wieruszewski.

Factual background

2.1 Between 1985 and 1989, the author worked as a United Nations (UN) Expert at the P5 level for the United Nations Department of Technical Cooperation for Development (UNDTCD) in Burma. Over that period, he claims to have been forced to pay a total of US$ 42,000 from his United Nations earnings to Polytechna Prague, a specialized recruitment agency for international organizations of the Czechoslovak government which allegedly covertly extracted taxes from its citizens' non-taxable United Nations income, in contravention of the domestic laws and the United Nations Convention on the Privileges and Immunities of the United Nations ("the United Nations Convention"), a Convention to which Czechoslovakia was a party since 1955. In order to obtain an exit-visa and be permitted to take up his United Nations employment, the author allegedly had to sign a secret "pre-contract" with Polytechna on 30 April 1985; he was forbidden from disclosing its contents to third parties, least of all to his United Nations employers. The Czechoslovak Embassy in Burma monitored the payments he made.

2.2 As a result of political changes in Czechoslovakia since November 1989, in a letter addressed to the author on 2 January 1990, Polytechna allegedly admitted its wrongdoing and offered to negotiate amicable settlements with all former United Nations personnel affected. However, it did not respond to the author's repeated requests seeking such a settlement.

2.3 On 26 May 1992, the author filed a civil claim for damages in the Prague District Court (*Obvodny sud*) against Polytechna. In a hearing held on 12 May 1993, the Court claimed difficulty understanding the author's Slovak language (though it was one of the two official languages until 31 December 1993) but did not provide the author with an interpreter. It allegedly questioned whether the author was covered by the United Nations Convention on Privileges and Immunities of the United Nations. The District Court ruled against him, supposedly basing its judgement exclusively on Polytechna's arguments. It concluded that the author's payments to Polytechna were "voluntary contributions" for its mediation services in recruiting him to the United Nations, although the author had received a direct job offer from the United Nations.

2.4 On 14 September 1993, the author appealed to the Prague Municipal Court (*Mestsky sud*). Without a hearing or a request for supplementary evidence, the Municipal Court upheld the decision of the District Court on 10 December 1993, stating that no further appeal was available.

2.5 The author nonetheless appealed to the Supreme Court (*Najvyssi sud*) on 1 March 1994. On 7 March 1996, the Supreme Court rejected his request and confirmed the Municipal Court's decision that its ruling was "final". According to the author, as with the Municipal Court, he was not called to the Supreme Court hearing, nor was he invited to present further evidence.

2.6 The author did not bring his claim before the Constitutional Court of the Czech Republic allegedly because neither he, nor his Slovakian lawyer, were informed about the existence of the Constitutional Court (which had just been constituted in Brno, Czech Republic), but was not yet fully operational.

2.7 The author submitted his claim to the European Commission of Human Rights (ECHR) on 17 October 1996 (case No. 34194/96). The ECHR at first questioned the admissibility on the ground that the author had not appealed to the Constitutional Court but then accepted the author's argument that he, as a foreigner, had not been informed of its existence. However, on 8 December 1997, the Commission declared the case inadmissible because its 6-month deadline for an appeal had lapsed.

The complaint

3.1 The author alleges that the Czech Republic violated article 2, paragraph 3 (a) and (b), of the Covenant by failing to provide him with an effective remedy for the violation of his rights as an international civil servant under the United Nations Convention and failing to advise him of the existence of further judicial remedies. He contends that the courts not only concealed the possibility of appeal to the newly established Constitutional Court of the Czech Republic to him, but also misled him by ruling that the decision of the Municipal Court could not be appealed.

3.2 He alleges that he is victim of a violation by the Czech Republic of his rights under article 14 of the Covenant, because the Czech judicial authorities did not grant him a fair and public hearing before an impartial and independent tribunal. With the exception of the court of first instance, he was allegedly "excluded" from all other proceedings. According to the author, the Czech courts' bias toward a former state institution (Polytechna) deprived him of an effective judicial remedy under the Covenant, as well as under domestic legislation and the United Nations Convention. The proceedings and the judgement of the District Court were allegedly based on Polytechna's submissions alone. He adds that the Czech courts allegedly delayed his case by stating that correspondence had been lost, by withholding information about available remedies, and by failing to provide an interpreter. Finally, by ruling that the obligatory deductions from the author's United Nations salary were "voluntary" contributions in exchange for Polytechna's assistance in securing the author's United Nations contract, the District Court is said to have violated the principle of impartiality.

3.3 The author further claims that the facts set out above also amount to a violation of article 26 of the Covenant, because the Czech courts allegedly discriminated against him as a national of the "secessionist" Slovak Republic, which reflected a broader trend to deny payments to Slovak citizens.

3.4 With regard to his claim against the Slovak Republic, since the laws governing the separation of Czechoslovakia required that cases against former federal Czech or Slovak Federal Republic (CSFR) institutions be examined by the courts in the district in which they were based, he pursued his case against the former federal institution Polytechna in the Czech Republic. He adds that after the dissolution of the CSFR, all former federal property with pending liabilities was divided at a ratio of 3 to 1 between the Czech and the Slovak Republics. Accordingly, his claim against the Slovak Republic should be considered as part of its shared liability with the Czech Republic and determined at the same ratio as between the two States.

Submission of the Slovak Republic on the admissibility of communication No. 1034/2001

4. By note of 18 November 2002, the Slovak Republic declined to comment either on the admissibility or merits of the complaint. First, it considered that only Czech courts were competent to receive the author's claim, because the Polytechna was based in Prague. Second, any civil proceeding initiated before the entry into force of the Agreement on Mutual Legal Assistance between the CSFR successor states (27 August 1993) was to be decided by the court of law to which it had originally been brought. Finally, the State party asserts that it cannot be

held responsible for the alleged violation of the United Nations Convention which had supposedly taken place on the territory of, and had been caused by, the actions of a third state. The Slovak Republic thus sought the case against it to be dismissed *ratione personae*.

Submissions of the Czech Republic on the admissibility of communication No. 1035/2001

5.1 By note verbale of 8 April 2004, the State party disputed the facts, and the admissibility and merits of the case. On the facts, it contends that the author had voluntarily entered into a contract with the "Czechoslovak United Nations Technical Assistance Recruitment Agency" (*Polytechna*) on 30 April 1985, pursuant to which he had agreed to pay contributions from his United Nations income. According to the State party, the Constitutional Court enjoyed "the power to quash a final decision of an authority of public power if it is at variance with the constitutional order and/or the promulgated international treaties on human rights and fundamental freedoms, binding on the Czech Republic, including the Covenant" on Civil and Political Rights. With the collapse of the former regime in 1989, he requested Polytechna to reimburse him for those deductions, as they allegedly contravened the United Nations Convention on the Privileges and Immunities of the United Nations. The Prague District Court concluded, on 12 May 1993, that the author had signed an "innominate contract" with Polytechna for its mediation services with a foreign employer and had voluntarily agreed to pay contributions which could not be considered to have been the equivalent of income-tax; the text of the United Nations Convention, published in the official Collection of Laws (No. 52/1956), was not concealed from the author in the CSFR; thus, the Polytechna contract was not inconsistent with the United Nations Convention in this respect. On appeal, the author and counsel had, according to the State party, excused themselves from the 10 December 1993 hearing in the Municipal Court, which upheld the District Court's judgement in the plaintiff's absence. The Municipal Court concluded that the court of first instance had prematurely examined the merits of the case, because it had not established that the author had an "urgent legal interest" in determining the non-existence of a legal relationship under the Code of Civil Procedure. According to the Municipal Court, since an "urgent legal interest" necessarily involved the provision of legal protection before a plaintiff's rights were violated, the author could not have possibly had any legal interest in such a case but was "only interested in removing the consequences of the violation of his right." The author then appealed to the High Court in Prague for an extraordinary remedy, arguing that his contributions to Polytechna should have been considered a violation of the United Nations Convention. As the High Court failed to examine the appeal by 31 December 1995, jurisdiction automatically passed to the Supreme Court under Act No. 238/1995 which had established two High Courts in the Czech Republic. On 7 March 1996, the Supreme Court declared the appeal inadmissible because, under Czech legislation, appeals on points of law against an appellate court's final judgement were admissible only if substantial procedural error had been committed and only if the appellate court had expressly allowed for such a review because of the fundamental legal importance of the case. Neither proviso applied to the author's proceedings, in which the Municipal Court had proscribed further appeal.

5.2 In view of the above, the State party considers that the case should be declared inadmissible for non-exhaustion of domestic remedies. The author should have appealed to the Constitutional Court of the Czech Republic, which was established by the Czech Constitution of 16 December 1992. Under the procedural provisions governing the submission of individual complaints, effective as of 1 July 1993, an individual could file a complaint within 60 days of having exhausted all other venues of legal protection. Since such complaints were "neither a regular nor an extraordinary remedy" and the relevant rules were clearly set out in the Constitution and the Act on the Constitutional Court, lower courts were not required to provide such information. Therefore, the author was not deprived of his right to appeal by not having been informed about the option of submitting a constitutional complaint. Finally, the Constitutional Court of the CSFR was still in existence in 1992 and analogous courts were established in both successor states. Accordingly, the author, who was represented by counsel at the time, failed to exhaust domestic remedies, as required by article 5 (2) (b) of the Optional Protocol.

5.3 The State party further asks that the author's claim under article 2 of the Covenant be declared inadmissible *ratione materaie*. It notes that the author argued that the Czech Republic had breached article 2 (3) (a) of the Covenant by denying him judicial protection against a violation of his rights under the United Nations Convention and article 2 (3) (b) by not informing him about the existence of the Constitutional Court; however, the domestic proceedings concerned an alleged breach of the United Nations Convention by his Polytechna contract. It argues that the Covenant is a "self-standing international treaty" which does not extend to the observance of other international instruments; thus, article 2 applies exclusively to the rights and freedoms guaranteed in the Covenant, not the ones arising from the United Nations Convention. Accordingly, the author's assertion that the rejection of his argument about a violation of the United Nations Convention also breached his Covenant rights is invalid.

5.4 Finally, the State party submits that the author's claims under articles 14 and 26 are unsubstantiated, as he failed to demonstrate how an alleged anti-Slovak attitude in the Czech Republic specifically affected his case, how the courts had been biased, and how he had been discriminated against as a foreigner or as a United Nations staff-member. The State party argues that the author's Slovak language was not a handicap in dealing with the Czech courts and dismisses his Slovak citizenship as irrelevant since no discrimination against Slovaks had been shown. The State party argues that the author never pleaded bias to challenge the impartiality of any individual judge and that he had allowed undue time to elapse after the end of the Czech and the ECHR proceedings before approaching the United Nations Human Rights Committee. Given the long lapse of time and the absence of evidence as to procedural fault, the State party objects to what it describes as an arbitrary challenge of the domestic courts' decision.

Author's comments on the submissions of the Czech Republic

6.1 Despite that the observations submitted by the Slovak Republic (as reflected in paragraph 4 above) were transmitted to the author, he did not present any comment.

6.2 In relation to the observations of the Czech Republic, the author has submitted his comments on 7 June 2004. He argues that the State party has factually misrepresented his case: there was nothing "voluntary" about his payments to Polytechna or his obligation not to disclose the secret contract; after all, Polytechna itself had admitted in 1990 that its actions, which were improper and unlawful, were based on directives of the former regime.

6.3 On his alleged failure to exhaust domestic remedies, the author submits that national courts "need not adjudicate his case at all because a violation of international law is involved", and the immunities protected by the United Nations Convention are best left to the competence of an international tribunal. He adds that Czech courts have been selective about the civil claims in which they ordered compensation for offences of the former regime and that past injustices against United Nations personnel whose rights and immunities had been violated equally warrant a legal remedy.

6.4 The author again claims that the Prague District Court was both unwilling and unqualified to consider a case concerning a violation of the United Nations Convention. He asserts that the publication of the text of the United Nations Convention in an official CSFR law gazette referred to by the State party was no more than that a document published but never physically distributed, not even to the courts. According to him, the District Court judge, who had never heard of the United Nations Convention or seen a United Nations Laissez-Passer, questioned his credentials, complained that the pass and the document setting out the immunities were not in the Czech language, and hence declined to accept a copy of the Convention. The national courts ruled that his *Polytechna* contract had been "voluntary" only because they allegedly did not understand the provisions of the United Nations Convention.

6.5 The author asserts that he could not possibly have excused himself from the Municipal Court hearing of 10 December 1993 since he had never received a notice while residing abroad; if this was done by his counsel, it was without his knowledge or approval. The court proceedings allegedly violated his rights under the Covenant because all higher courts based their judgements on the District Court's findings, without understanding the State party's obligations derived from the United Nations Convention and without allowing him to be present at hearings.

Issues and proceedings before the Committee

7.1 Before considering any claim contained in a communication, the Human Rights Committee must, in accordance with rule 93 of its Rules of Procedure, decide whether or not the complaint is admissible under the Optional Protocol to the Covenant.

7.2 The Committee has noted that the author submitted his case to the former European Commission on Human Rights (case 34194/96) which, on 8 December 1997, declared it inadmissible as having been submitted outside the six month deadline. In accordance with its jurisprudence, the Committee considers that the former European Commission did not "examine" the author's case within the meaning of article 5, paragraph 2 (a), and that it is therefore not precluded from considering the case under this provision.[2]

7.3 As to the claim of a violation of article 26 because of alleged bias and discriminatory attitude of the Czech Courts, the Committee considers that the author has failed to substantiate this claim sufficiently, for purposes of admissibility. Accordingly, this claim is inadmissible under article 2 of the Optional Protocol.

7.4 On the issue of exhaustion of domestic remedies in relation to the article 14 claim, the Committee has noted the arguments advanced by the State party and the explanation given by the author that he had brought his claim before all instances of the Czech legal system, except to the Constitutional Court of whose existence he allegedly was unaware, and exhausted all domestic remedies available to him in the Czech Republic. The Committee notes that the Constitutional Court existed at the time the Supreme Court ruled against the author, and was in fact accepting constitutional complaints. The Committee recalls its jurisprudence[3] that the fact of being unaware, as a foreigner or otherwise, of the existence of a constitutional court does not exempt an individual from the duty to exhaust available domestic remedies, save in cases where the specific circumstances would have made it impossible to obtain the necessary information or assistance. Given that the author had legal representation throughout the Czech legal proceedings and that the Constitutional Court had jurisdiction over the fair trial issues raised, the Committee considers that neither exception applies to the author's case. Accordingly, the Committee considers that the author has not shown why he could not have reasonably been expected to challenge the Supreme Court's decision in the Constitutional Court. The Committee thus concludes that as far as the communication might give rise to a claim under the Covenant, domestic remedies have not been exhausted for the purposes of 5, paragraph 2 (b) of the Optional Protocol.[4]

7.5 The Committee notes that the author's claim against the Slovak Republic is based on the reasoning that, since all former federal property with pending liabilities was divided at a ratio of 3 to 1 between the Czech Republic and the Slovak Republic, the latter should be held responsible in relation to the author's claims before the Committee at the same ratio. As the Committee has considered the communication inadmissible in relation to the Czech Republic because of non-exhaustion of domestic remedies, the author has no separately subsisting claim in relation to the Slovak Republic and this part of the communication is inadmissible under article 2 of the Optional Protocol.

8. The Committee therefore decides:

(a) That the communications are inadmissible under article 2 and article 5, paragraph 2 (b), of the Optional Protocol;

(b) That this decision shall be communicated to the author and to the authorities of the Czech Republic and the Republic of Slovakia.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the Committee's annual report to the General Assembly.]

Notes

[1] The Optional Protocol entered into force for the Czech and Slovak Federal Republic (CSFR) on 12 March 1991. The CSFR ceased to exist on 31 December 1992, dissolving into the Czech Republic and the Slovak Republic, which notified their succession to the Covenant and Optional Protocol on 22 February 1993 and 28 May 1993, respectively.

[2] See, e.g., *Nikolov v. Bulgaria* (No. 824/1998), inadmissibility decision adopted on 24 March 2000, para. 8.2; and *Luis Bertelli Gálvez v. Spain*, (No. 1389/2005), inadmissibility decison adopted on 25 July 2005, para 4.3.

[3] See *Jarmila Mazurkiewiczova v. the Czech Republic* (No. 724/1996), Inadmissibility Decision of 26 July 1999; *Gerhard Malik v. the Czech Republic* (No. 669/1995), Inadmissibility Decision 21 October 1998.

[4] *Ibrahim Mahmoud v. Slovakia* (935/2000), inadmissibility decision of 23 July 2001.

E. Communication No. 1056/2002, *Khatcharian v. Armenia* (Decision adopted on 28 October 2005, eighty-fifth session)*

Submitted by: Svetlana Khachatrian (represented by counsel, Mr. Arthur Grigorian)

Alleged victim: The author

State party: Armenia

Date of communication: 24 September 2001 (initial submission)

Subject matter: Conviction for assault; inability to examine young child to corroborate self-defence

Substantive issues: Equality of arms; right to examine a material witness

Procedural issues: None

Articles of the Covenant: 2 (3); 14 (1), 3 (a), (b), and (e)

Article of the Optional Protocol: 2

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 28 October 2005,

Adopts the following:

Decision on admissibility

1. The author is Svetlana Khachatrian, an Armenian citizen, born in 1958. She claims to be a victim of violations by Armenia of articles 2, paragraph 3; and 14, paragraphs 1, 3 (a), (b) and (e) of the International Covenant on Civil and Political Rights. She is represented by counsel.

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* The following members of the Committee participated in the examination of the present communication: Mr. Nisuke Ando, Mr. Prafullachandra Natwarlal Bhagwati, Mr. Alfredo Castillero Hoyos, Ms. Christine Chanet, Mr. Maurice Glèlè Ahanhanzo, Mr. Edwin Johnson, Mr.Walter Kälin, Mr. Ahmed Tawfik Khalil, Mr. Rajsoomer Lallah, Mr. Michael O'Flaherty, Ms. Elisabeth Palm, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Ivan Shearer, Mr. Hipólito Solari-Yrigoyen, Ms. Ruth Wedgwood and Mr. Roman Wieruszewski.

Factual background

2.1 Ms. Khachatrian lived with her daughter, her sister-in-law, Ms. Zakarian, and Ms. Zakarian's son in an apartment in Yerevan. Her relationship with Ms. Zakarian was strained, and on 7 April 2000, a domestic argument arose between them. Following the argument, Ms. Khachatrian was standing on the balcony with her daughter, when Ms. Zakarian approached them waving a knife, shouting that she was going to kill Ms. Khachatrian. Fearing that she or her daughter would be injured, Ms. Khachatrian reached for a glass jar and threw it at Ms. Zakarian, hitting her in the face, and causing Ms. Zakarian to drop her knife; Ms. Zakarian sustained injuries to her face and was hospitalized. At the time of the attack, Ms. Zakarian's son was in a room adjoining the balcony, but the curtains were drawn, and so he could not have seen what occurred.

2.2 On 12 May 2000, a criminal investigation into the incident was opened, which was described in the police order opening the investigation as an incident in which Ms. Khachatrian had intentionally caused light bodily injury, in apparent contravention of section 109 of the Armenian Criminal Code. During the investigation, however, the author was questioned, but only as a witness, not as an accused. Ms. Zakarian's son was also questioned; he stated that he had seen what occurred, and that at the time of the incident his mother did not have a knife. However, Ms. Khachatrian's daughter, who was an eyewitness to the incident, and who could have corroborated her mother's version of events, was not questioned. Ms. Khachatrian made numerous oral requests to the investigator for the authorities to question her daughter, however her requests were refused. On 26 May 2000, she filed a complaint with the local Procurator about the biased investigation conducted in the case; she did not receive a reasoned answer to her complaint. On 1 June 2000, she filed a complaint with the city Procurator, complaining that Ms. Zakarian's son had been questioned about the incident but not her daughter; this complaint was left unanswered as well.

2.3 On 27 July 2000, the investigator informed her, in the presence of her lawyer who had only just been allowed to participate in the investigation, that she would be charged with causing serious bodily injury. She was presented with the police file and evidence against her, and learned that on 13 May, the prosecutor had issued an order recognizing Ms. Zakarian as the victim of the incident and as a civil plaintiff. He had also familiarized Ms. Zakarian with the criminal file against Ms. Khachatrian, including the medical assessment of her injuries as 'light'. Subsequently, the investigator had arranged for a further two examinations to be conducted, as a result of which Ms. Zakarian successfully applied to have her injuries reclassified as serious. Ms. Khachatrian was not advised of this until the end of the pretrial investigation. The investigator had concluded that there was no evidence to charge Ms. Zakarian for attacking Ms. Khachatrian with a knife, and returned to Ms. Zakarian a knife which had previously been seized as evidence.

2.4 At Ms. Khachatrian's trial in the Arabkir and Kanaker-Zeitun Regional Court, her lawyer asked to examine the daughter, noting that the investigator had relied on the evidence provided by Ms. Zakarian's son in deciding to press charges against Ms. Khachatrian instead of Ms. Zakarian. He submitted that to deny his client the right to question her daughter in court would violate article 14 of the Covenant, but the court rejected her lawyer's request without giving a reason.

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21 August 2000, Ms. Khachatrian was found guilty and sentenced to two years ent, deferred for a period of two years. She appealed her conviction, complaining that have been allowed to question her daughter, and also requesting that she be allowed her partner, who at the time of the attack was waiting outside her building for a bus. tember 2000, the Court of Appeal dismissed her appeal, stating that sufficient ad been compiled to reach a final decision in the case. Her appeal to the Court of was dismissed on 26 October 2000, on the same grounds.

laint

e author claims that the courts' failure to allow her to question her daughter and out the events in question gave rise to violations of article 14, paragraphs (1) and 3 (e), not receive a fair trial, and was unable to examine two material witnesses in her amely her daughter and her partner.

e claims that her rights under article 14, paragraph 3 (a), were violated, as she was ally charged with causing light bodily harm, even though she was being investigated rd; she was not provided with information about the basis of the charge. Only on 00 was she formally presented with the revised charge of causing serious bodily same day on which the investigation formally was concluded.

e author claims that her rights under article 14, paragraph 3 (b), were violated, s a result of not having had the formal status of an accused until the end of the on period, she was deprived of certain rights in the preparation of her defence, in he right to seek expert opinions. Further, she did not have any possibility to choose wyer, or to meet with such a person to prepare her defence.

ally, the author claims that her right to a remedy under article 2, paragraph 3, of the has been violated.

y's observations on admissibility and merits and author's comments

its submission of 14 May 2002, the State party contended that the communication is le and unsubstantiated. It states that on 12 May 2000, a criminal case was opened in an incident in which the author allegedly caused light bodily injury to Ms. Zakarian in ontravention of the Armenian Criminal Code. On 5 and 14 June 2000, in accordance rmenian Criminal Procedure Code, further medical examinations of the alleged victim ed out, which determined that Ms. Zakarian had suffered permanent facial ent. On 27 June 2000, the terms of the investigation were altered to reflect the new idence (i.e. alleged causing of serious bodily injury).

17 May 2000, Ms. Khachatrian was questioned as a witness, as there was not yet idence to formally charge her and question her as an accused. Through subsequent g of Ms. Zakarian, her son, and several other persons, sufficient evidence was obtained Ms. Khachatrian. In the course of the investigation, based on the statements of an and her son, and the protocol of the inspection of the scene, it was found that atrian's version of events was not substantiated.

4.3 The requests of Ms. Khachatrian and her lawyer that the authorities question her daughter, who was then only five years old, were rejected both by the investigating authorities and the courts, because article 207 of the Armenian Criminal Procedure Code provides that minors may be examined only if they are able to provide significant information in relation to a case. Further, evidence subsequently obtained by the authorities established that the author's daughter was not in fact at the scene of the incident.

4.4 The State party contends that all stages of the process were conducted lawfully. All available documentation indicates that the Armenian authorities involved in this matter acted in accordance with both national and international legal standards.

5.1 In comments dated 2 July 2002, the author submits that she was not informed about the nature of the investigation against her in relation to causing light bodily injury, and was not presented with the final charge and evidence against her until the end of the investigation; by contrast, Ms. Zakarian was recognized as a victim much earlier and given access to the criminal file, in particular the medical evidence.

5.2 The author states that the investigator must have had enough evidence to formally charge her with causing light bodily injury, because Ms. Zakarian was recognized as a victim and as a civil claimant.

5.3 The author notes that she suffered an attack on her life, in violation of article 6 of the Covenant, and that the State party refused to provide her with a remedy in relation to this, as required by article 2, paragraph 3 of the Covenant.

5.4 Finally, the author states that the State party offered no explanation of why her request to question her partner was rejected.

Issues and proceedings before the Committee

6.1 Before considering any claim contained in a communication, the Human Rights Committee must, in accordance with rule 93 of its Rules of Procedure, decide whether or not the case is admissible under the Optional Protocol to the Covenant.

6.2 The Committee has ascertained, as required under article 5, paragraph 2 (a), of the Optional Protocol, that the same matter is not being examined under another procedure of international investigation or settlement.

6.3 The Committee considers that the author's allegations in relation to the State party's alleged failure to provide her with a remedy for the alleged attack on her life by Ms. Zakarian have not been substantiated and are accordingly inadmissible under article 2 of the Optional Protocol.

6.4 As to the author's claim under articles 14, paragraph 3 (a) and 3 (b), the Committee notes that the authorities opened their investigation into the incident on 12 May 2000, and did not formally press charges against the author until 27 July 2000. However article 14, paragraph 3 (a) applies only to criminal charges, not to criminal investigations; there were no charges against the author until 27 July 2000, when she was duly informed of the charge in question. Furthermore, it has not been established that the authorities used unfair tactics or deliberately refrained from formally laying charges they had every intention to press at a later time; rather, as the State party has explained, charges were not laid at an earlier stage because there was insufficient evidence to charge the author. Whilst the author contests this, the Committee is not in a position to resolve this factual question. Further, the fact that the police shared certain information with Ms. Zakarian, and issued a certificate recognizing her right to bring a civil claim against the author does not involve any violation of article 14 (3) of the Covenant, which relates to criminal, and not to civil proceedings. Finally, the author has not substantiated her claim that, because she was not formally charged until the very end of the criminal investigation, she was deprived of the right to seek expert opinions or choose her own lawyer. Accordingly, the Committee considers these claims to be inadmissible under article 2 of the Optional Protocol.

6.5 As to the author's remaining claims under article 14, paragraphs 1 and 3 (e), the Committee has noted the State party's arguments that the author's requests for her daughter, and later for her partner, to be examined were rejected on the basis that minors may only be examined if they are able to provide significant information in relation to the case, and that evidence subsequently obtained by the authorities established that in fact neither the author's daughter, nor her partner, were at the scene of the incident. The author maintains that her daughter's evidence was critical to her defence. The Committee observes that, in substance, this part of the communication relates to an evaluation of elements of facts and evidence. It refers to its prior jurisprudence and reiterates that it is generally for the appellate courts of States parties to the Covenant to evaluate facts and evidence in a particular case, unless it can be ascertained that this evaluation was clearly arbitrary or amounted to a denial of justice[1]. The material before the Committee does not show that the courts' examination of the above allegations suffered from such defects. The Committee is not in a position to evaluate the State party's assessment of the competence of the author's daughter and partner to give evidence, or the possible relevance of their evidence to the case. Accordingly, the Committee declares the author's claims in this regard inadmissible under article 2 of the Optional Protocol.

7. The Human Rights Committee therefore decides:

(a) That the communication is inadmissible under article 2, of the Optional Protocol;

(b) That this decision shall be transmitted to the State party and to the author, for information.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the Committee's annual report to the General Assembly.]

Note

[1] See, for example, *Errol Simms v. Jamaica*, communication No. 541/1993, inadmissibility decision adopted on 3 April 1995.

F. Communication No. 1059/2002, *Carvallo v. Spain*
(Decision adopted on 28 October 2005, eighty-fifth session)*

Submitted by:	Héctor Luciano Carvallo Villar (represented by counsel, Luis Sierra y Xauet)
Alleged victim:	The author
State party:	Spain
Date of communication:	12 February 2001 (initial submission)
Subject matter:	Conviction of the author on insufficient evidence
Procedural issues:	Exhaustion of domestic remedies, failure to substantiate claims
Substantive issues:	Presumption of innocence, accused's right to the assistance of counsel of his choice
Articles of the Covenant:	2, paragraphs 3 (a) and (b); 14, paragraphs 1, 2, 3 (d) and 5
Articles of the Optional Protocol:	2; 5, paragraph 2 (b)

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 28 October 2005,

Adopts the following:

Decision on admissibility

1. The author of the communication, which is dated 12 February 2001, is Héctor Luciano Carvallo Villar, a Chilean national, who alleges violation by Spain of articles 2, paragraphs 3 (a) and (b); and 14, paragraphs 1, 2, 3 (d) and 5, of the Covenant. The author is represented by counsel, Luis Sierra y Xauet.

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* The following members of the Committee participated in the examination of the present communication: Mr. Nisuke Ando, Mr. Prafullachandra Natwarlal Bhagwati, Mr. Alfredo Castillero Hoyos, Ms. Christine Chanet, Mr. Maurice Glèlè Ahanhanzo, Mr. Edwin Johnson, Mr. Walter Kälin, Mr. Ahmed Tawfik Khalil, Mr. Rajsoomer Lallah, Mr. Michael O'Flaherty, Ms. Elisabeth Palm, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Ivan Shearer, Mr. Hipólito Solari-Yrigoyen, Ms. Ruth Wedgwood and Mr. Roman Wieruszewski.

Factual background

2.1 On 25 June 1997, the author was sentenced by the Barcelona Provincial Court to eight years' imprisonment and a fine for offences against public health (drugs trafficking). The author applied for judicial review before the Supreme Court, which rejected the application in a ruling of 14 July 1999.

2.2 While the review application was being prepared, the author asked to be assisted by counsel of his choice. His counsel sought the consent of the court-appointed counsel, who received a sum of money from the author as a fee. The court-appointed counsel did not consider the fee adequate, however, and would not consent to the change. Consequently, the court did not accept the author's proposed new counsel, who was unable to act in his defence. The application was thus filed by counsel not of the author's choice.

2.3 The Supreme Court's judgement was communicated to the court-appointed *procurador* (court representative), Fontanilles Fornielles, on 2 September 1999, but the author was not informed. By the time the counsel he had appointed heard about the judgement and informed the author, the deadline for submitting an application for *amparo* - 20 days from the date of notifying the *procurador* - had passed. The author's appointed attorney nonetheless submitted an application for *amparo* on 31 January 2000, but it was found inadmissible *ratione temporis* by the Constitutional Court on 5 May 2000.

2.4 The author states that he was convicted on the basis of voice identifications by the Provincial Court from monitored telephone calls. He alleges that the phone-tap evidence was handled without adequate safeguards as required in article 14, paragraphs 1 and 2, of the Covenant, on the following grounds:

(a) The examining magistrate did not listen to all the tapes but was given selected recordings chosen by the police. Under the Criminal Procedure Act, telephone communications must be considered in the presence of the judge, the secretary - who should prepare a record - and the accused. Moreover, any transcription of items of interest or extracts of monitored telephone conversations must be done by the examining magistrate. Yet in this case the Court was provided with transcribed extracts of calls which had been selected by the police and merely noted by the secretary;

(b) The judge examined this evidence in the absence of the accused;

(c) The phone-tap warrant failed to provide the requisite grounds for the measure, although according to the judgement, it contained the basic information required such as the offence and the period of monitoring. This constituted a violation of the right to privacy of correspondence under the Constitution, for the fact that it referred to the offence alone and failed to provide any evidence to substantiate the measure or to mention that it was a criminal matter or to explain in what way it concerned the person under investigation, effectively made it an arbitrary measure;

(d) The evidence was not presented in accordance with the rules of documentary evidence since it was not reproduced at the trial, and it was not established that the calls had been made by the accused. Neither the author nor his co-defendant admitted that the author's voice was one of those to be heard on the tapes. Moreover, the expert voice analysis of the tapes failed to establish the degree of similarity between the author's voice and the voice on the tapes. The fact that the Court found the voices similar was only one element among others in the body of evidence, and could not have carried enough weight to convict the author and overturn the presumption of innocence.

2.5 The author states that this matter has not been submitted to any other procedure of international investigation or settlement.

The complaint

3.1 The author alleges a violation of his right to an effective remedy under article 2, paragraphs 3 (a) and (b), of the Covenant, on the grounds that the Supreme Court judgement of 14 July 1999 was not conveyed to him in time to submit an application for *amparo*.

3.2 He also claims a violation of article 14, paragraphs 1 and 2, for the absence of guarantees in considering the evidence upon which his conviction was based: the phone tap was not adequately supervised by the court or authorized by a duly substantiated warrant and the evidence was not reproduced in accordance with the rules of documentary evidence. He was thus deprived of a defence and denied the right to presumption of innocence.

3.3 The author alleges a violation of the right to be assisted by counsel of his choice under article 14, paragraph 3 (d), of the Covenant: the Court should have accepted the author's designated counsel without seeking the consent of the court-appointed counsel, a requirement that is not to be found anywhere in domestic or international law. The matter of consent between lawyers should not amount to a denial of the right to counsel of one's choice.

3.4 The author also alleges a violation of article 14, paragraph 5, of the Covenant, on the grounds that the Supreme Court failed to review or scrutinize the evidence considered by the trial court or to assess whether it was lawful or sufficient.

State party's submissions on admissibility, and author's comments

4. In its submission of 6 May 2002, the State party contests the admissibility of the communication on the grounds that the author has not exhausted domestic remedies. In the lower court the author was represented by a court-appointed *procurador*, Mr. Fontanilla Fornielles, who gave his consent for another *procurador*, Ms. Echevarría, to deal with the application for judicial review. The latter subsequently declined to act as *procurador* for the author and asked the Court to appoint a *procurador*. The Court again appointed Mr. Fontanilla Fornielles, to whom the Supreme Court judgement was communicated on 2 September 1999. By the time the application for *amparo* was submitted on 31 January 2000, the 20-day deadline for applications to the Constitutional Court was long past and the application was therefore rejected as time-barred.

5.1 The author responded to the State party's submissions on 5 July 2002. He states that the Supreme Court judgement was communicated to the court-appointed counsel on 2 September 1999. When the author's appointed attorney learnt that judgement had been handed down, he went to the Barcelona Provincial Court on 19 January 2000, where he was given a copy. That should be the date from which the deadline for the application for *amparo* should be calculated, since that was the date when the defence counsel appointed by the author was notified of the judgement. Consequently, the application for *amparo* submitted on 31 January 2000 was in time and should have been admitted.

5.2 The author also draws attention to the special nature of the *amparo* application and argues that, in order to exhaust domestic remedies, such remedies must have some prospect of success.

6. In further comments dated 13 September 2002, the State party points out that, in the Spanish system, judgements are communicated to the *procurador*, who handles procedural matters on the party's behalf, and not to counsel, who is responsible for the technical side of the party's defence. Provision of a copy of the judgement should not be confused with formal notification thereof.

State party's submissions on the merits, and author's comments

7.1 In its submission of 4 September 2002, the State party maintains that there has been no violation of the Covenant. In respect of the allegations of a violation of article 14, paragraphs 1 and 2, and with reference to the author's contestation of the phone-tap warrant, it states that the Provincial Court judgement in fact includes the legal basis for the action: there are details of the prima facie evidence, the telephone number, the person under investigation and the period authorized, as well as the requirement for original tapes, a reference to legal principles and a description of the offence under investigation. The Supreme Court found the phone tap to be in accordance with the law. The State party also refers to those points in the lower court judgements which showed the reasoning that convinced the Court that the person speaking in the taped conversations was the author, and concludes that the oral hearings were conducted in full accordance with the principle of adversarial procedure.

7.2 As to the allegations concerning article 14, paragraph 3 (d), the State party points out that the author was assisted in the review proceedings by a court-appointed counsel at his own express request, on the grounds of lack of financial means. He later changed his mind and, making clear that he had the means, asked to appoint counsel of his choice. However, since he now had the means to do so, he was required to pay a fee to the court-appointed counsel for the work that had been done. The author did not wish to pay a fee and he does not appear to have discussed the matter with the Bar Association. In the course of the domestic proceedings, the author did not seek the consent of the court-appointed counsel (Bar Statute, art. 33) or discuss his obligation to pay the court-appointed counsel's fees or the amount thereof. Consequently, the author cannot hold the Spanish authorities responsible for his changes of mind and his own acts or omissions.

7.3 As to the allegations of a violation of article 14, paragraph 5, the State party points out that this provision does not give the right to a second hearing with a full rerun of the trial, but the right to a review by a higher court of the conduct of the trial at first instance and verification of the proper application of the rules in arriving at the conviction and the sentence imposed in any given case. The review procedure may be governed by domestic law, which shall establish its scope and limitations.

7.4 The Supreme Court reviewed the case to establish whether any prosecution evidence existed and concluded that it did. It also verified that the prosecution evidence had been lawfully obtained and concluded on reasoned grounds that such was the case. It also reviewed the case to ensure that the guilty verdict and conviction had not been the result of arbitrary, irrational or absurd considerations and concluded on reasoned grounds that the Court's consideration had been logical and rational. In respect of the phone-tap tapes, the review judgement states:

> "The sentencing Court, in concluding that it was [the author's voice], reasons as follows: when he makes the call, he identifies himself using that name; he is so addressed by the co-defendants; his is the name under which the telephone he is using is registered; and the Court itself, notwithstanding the inconclusive nature of the voice-identification test suggested by the accused himself, recognizes Luciano's voice as that of the accused it has seen and heard in the oral hearings. Thus the Court had before it not only evidence of the reality of the cocaine dealing but also a whole body of circumstantial evidence arising out of the statements of a co-defendant, as well as direct evidence. The Court applied logical reasoning in order to arrive at an understanding of how the various elements, taken together, demonstrate the appellant's involvement in the matter. These are the points relating to the right to presumption of innocence that this review Court may examine and verify."

7.5 As to the phone-tap warrant, the Supreme Court states:

> "The monitoring of co-defendant Antonia Soler Soler's telephone was ordered on the basis of a detailed police report describing the frequent contacts between that subscriber and the man living with her, and individuals who had been arrested for possession of drugs; the warrant dated 27 October 1993 contains a general argument based on the applicable legislation and a specific argument relating to the subscriber, giving details of the number and its location and providing a time frame for reporting the results. No more than 10 days later, the police provided the court with a seven-page report on the results of the phone tap, detailing each day's calls, and on 12 November they uncovered the attempt to set up a cocaine deal which gave rise to this case and in relation to which the Court was able to hear during the trial the original tapes of the conversations, which led to the conviction referred to in the earlier judgement. Thus the telephone-monitoring procedure cannot be said to have failed to meet any of the conditions imposed to prevent violation of this constitutional right."

7.6 At no time during proceedings in the domestic courts did the author or his appointed counsel express any doubts concerning the scope or proper conduct of the judicial review, or bring any complaint against the Supreme Court for violation of the right to a second hearing.

8.1 In his comments of 24 November 2002, the author restates his claims concerning the judicial review. In his view, this remedy is one which precludes any defence, since it does not allow the submission of new evidence that might arise later or any weighing of the evidence. He also points out that the State party makes no reference in its reply to his complaint to the Committee of interference in private communications, and he therefore takes it the State party admits that violation of the Covenant.

8.2 The author repeats his earlier arguments. He points out in particular that the Supreme Court did not accept his change of counsel, thereby denying him the right to counsel of his choice. It also meant the *procurador* he had appointed had to decline to represent him. Her withdrawal was thus not voluntary but forced upon her by the Supreme Court.

8.3 In the Spanish system, a convicted person must be notified of the judgement. In this case, the author was arrested and went to prison because he had not been notified of a judgement. When the Supreme Court judgement reached the Provincial Court, the author's appointed counsel had not ceased to represent him, as it was he who had defended the author in the Provincial Court.

Issues and proceedings before the Committee

9.1 Before considering any claim contained in a communication, the Human Rights Committee must, in accordance with rule 93 of its rules of procedure, decide whether or not the communication is admissible under the Optional Protocol to the Covenant.

9.2 The author alleges a violation of the Covenant on the grounds that the Supreme Court judgement was not communicated to him in time to submit an application for *amparo*. The State party maintains that the judgement was sent to the *procurador* who had handled the case. In the Committee's view, the State cannot be held responsible for the *procurador*'s failure to notify the author of the judgement in time for him to submit the relevant appeals. The Committee therefore finds that this part of the communication is not duly substantiated and is therefore inadmissible under article 2 of the Optional Protocol.

9.3 As to the claims that the author was denied representation by counsel of his choice in the judicial review procedure, and that the Supreme Court judgement was not sent to him directly, the Committee notes that the author made no appeal to the Spanish authorities on these grounds, and therefore finds that this part of the communication should be declared inadmissible for non-exhaustion of domestic remedies, in accordance with article 5, paragraph 2 (b), of the Optional Protocol.

9.4 With regard to the claims of an absence of guarantees in respect of the evidence upon which the conviction was based, the Committee finds that, in view of the failure to submit an application for *amparo*, through no fault of the State, these allegations should also be declared inadmissible for non-exhaustion of domestic remedies.

9.5 With regard to the alleged violation of article 14, paragraph 5, it is clear from the judgement of the Supreme Court that the Court looked very closely at the Provincial Court's assessment of the evidence. In this regard, the Supreme Court considered that the evidence against the author was sufficient to set aside the presumption of innocence.[1] The claim regarding article 14, paragraph 5, is therefore, insufficiently substantiated for purposes of admissibility. The Committee concludes that this claim is inadmissible under article 2 of the Optional Protocol.

10. The Human Rights Committee therefore decides:

(a) That the communication is inadmissible under articles 2 and 5, paragraph 2 (b), of the Optional Protocol;

(b) That the decision be transmitted to the State party and to the author.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the Committee's annual report to the General Assembly.]

Note

[1] Cf. communication No. 1399/2005, *Cuartero v. Spain*, decision dated 7 July 2005, para. 4.4.

G. Communication No. 1062/2002, *Smidek v. Czech Republic*
(Decision adopted on 25 July 2006, eighty-seventh session)[*]

Submitted by:	Mr. Stanislav Šmídek (not represented by counsel)
Alleged victim:	The author
State party:	The Czech Republic
Date of communication:	20 October 1996 (initial submission)
Substantive issues:	Discrimination, effective remedy, access to public service, protection of honour
Procedural issues:	None
Articles of the Covenant:	2, paragraph 3 (b), 17, 25 (c) and 26
Articles of the Optional Protocol:	2 and 5, paragraph 2 (b)

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 25 July 2006

Adopts the following:

Decision on admissibility

1. The author of the communication is Stanislav Šmídek, a Czech citizen, born in April 1937 in Šlapanice, Czech Republic. He claims to be a victim of a violation by the Czech Republic[1] of articles 2, paragraph 3 (b), 17, and 25 (c), read in conjunction with article 26, of the International Covenant on Civil and Political Rights (the Covenant). He is not represented by counsel.

Factual background

2.1 After the Soviet occupation of Czechoslovakia in 1968, the author, who had publicly opposed the occupation, was forced to leave the Prosecutor's department where he was employed, and to work in the road construction industry. In 1989, he was removed from his position as Head of the Sokolov Labour Office, after having called for the moral condemnation of leaders of the former communist regime. The author's communication relates to two issues:

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[*] The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Nisuke Ando, Mr. Prafullachandra Natwarlal Bhagwati, Mr. Maurice Glèlè Ahanhanzo, Mr. Edwin Johnson, Mr. Walter Kälin, Mr. Ahmed Tawfik Khalil, Mr. Rajsoomer Lallah, Ms. Elisabeth Palm, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Ivan Shearer and Mr. Hipólito Solari-Yrigoyen.

2.2 The first set of events giving rise to the author's communication relate to his application for positions in the judicial sector. On 29 June 1993, he applied for a judicial position at the Pilsen Regional Court (Regional Court). Unlike other candidates, who were accepted on the condition of passing an exam similar to one already passed by the author at an earlier stage, the author was required to undergo an additional personality test, designed to assess his psychological suitability for judicial office. According to the author, this test was conducted by an expert "whose connections with the former communist regime could not be excluded". On 2 September 1993, based on the results of the test, the author's application was dismissed. When the author expressed doubts about the objectivity of the test, he was informed by the Ministry of Justice that the results of the test were not the sole and decisive criterion for an appointment, but a secondary factor in the selection process.

2.3 On 10 September 1993, the author applied for a position with the Regional Prosecutor of Pilsen. His application was dismissed on 24 March 1994, with reference to the unsatisfactory results of his personality test. On 7 April 1994, the author filed a constitutional complaint claiming that the dismissal of his job application by the Regional Prosecutor violated article 26, paragraph 2, of the Charter of Fundamental Rights and Freedoms, according to which the conditions and restrictions for certain professions and activities may be defined by law. He claimed that his application was rejected on the ground of non-compliance with a condition not defined by the relevant law (Public Prosecutor Act No. 283/1993) but by an individual legal act of the Minister of Justice.

2.4 On 6 September 1994, the author's constitutional complaint was dismissed on procedural grounds. The Constitutional Court noted that according to Section 72, paragraph 1 (a), of Constitutional Act No. 182/1993, constitutional complaints may only be lodged by persons who claim that their constitutional rights or freedoms have been violated as a result of an interference by a public authority. It considered, however, that the rejection of a job application does not constitute "interference by a public authority", even if the potential employer is the State. It concluded that the rejection of the job application was not an act which could be challenged by a constitutional complaint under Act 182/1993.

2.5 The second set of events relate to the alleged defamation of the author while he was the Head of the Sokolov Labour Office. On 31 August 1992, a complainant (JD) sent a letter to the Minister of Labour and Social Affairs, which contained allegedly defamatory information and false accusations, and called for the author's removal from his post. On the basis of this letter, the Labour Ministry conducted an inquiry at the author's office, but did not find any serious failings that would justify his removal. JD allegedly acted on the basis of information obtained from another person (TK), who published several articles in the regional press about the author's performance in his post. TK omitted to mention, in his articles, that the Labour Ministry inspectors found no serious shortcomings with the author's work. Consequently, when the author was removed at a later date, the public mistakenly assumed that his removal was due to the results of the inquiry.

2.6 The author initiated two sets of proceedings: an action for protection of his rights, and criminal proceedings against JD and TK. In the first set of proceedings, the author filed an action for the protection of his rights with the Regional Court on 20 May 1993. He requested the

Court to order JD and TK to refrain from violating his right to protection of honour and reputation by spreading defamatory information about his work. On 6 June 1994, the Regional Court dismissed the author's action, on the ground that neither of the two defendants had violated the author's personal rights, because their statements did not contain any false, misleading or defamatory information. The author's honour had thus not been harmed.

2.7 On 29 February 1996, the Prague High Court (High Court) upheld the judgement of the Regional Court. It changed the decision on costs and ordered the author to refund the legal costs of the defendants. On 19 May 1996, the author brought criminal charges against the members of the court's panel for abuse of public authority under Section 158, paragraph 1 (a) and (c), of the Criminal Code. He claimed that they committed a crime by refusing to categorise JD's and TK's actions as wrongful interference with his personal rights.

2.8 On 4 July 1996, the District Court in Sokolov ordered the execution of the High Court judgement of 29 February 1996 and ordered the attachment of the author's wages. By resolution of 13 August 1996, the Regional Court dismissed the author's appeal of this order. On 23 February 1999, the Supreme Court rejected the author's petition for review of the resolution. It considered that the petition did not come under any of the grounds for appellate review defined by law and that the decision against which it was directed could not be challenged by means of this extraordinary remedy. The Supreme Court also rejected the author's claim that the conditions for admissibility of petitions for appellate review as defined in Sections 238 (a) and 239 of the Code of Civil Procedure were inconsistent with the fundamental rights and freedoms safeguarded by international instruments binding on the State party.

2.9 On 23 September 1996, the author applied for a rehearing of his action for the protection of his personal rights and appealed against the 4 July 1996 order which authorized the execution of the High Court judgement. The Regional Court dismissed his claims on 13 November 1996, on the ground that the courts are bound by final judgements and cannot review them.

2.10 On 8 December 1996, the author filed another constitutional complaint, requesting the Constitutional Court to overrule the judgements of the High Court, the Regional Court and the District Court in Sokolov, claiming that they violated his right to a fair trial because the courts allegedly refused to take into account his final motions, did not thoroughly examine the case and sufficiently substantiate their decisions. He was asked to choose a legal counsel, which he refused to do because he was a member of the Bar Association. On 6 January 1997, the Court informed the author that, according to Constitutional Court Opinion ÚS-st-1/96, every party to Constitutional Court proceedings, regardless of professional qualifications, must be represented by legal counsel. On 10 January 1997, the author sent the power of attorney for his legal counsel. However, on 14 January, this lawyer informed the Court that she had not agreed to represent the author. Since he failed to provide proper powers of attorney within the prescribed time limit, the Constitutional Court rejected the author's complaint.

2.11 In relation to the second set of proceedings, the author filed criminal charges against JD and TK on 26 July 1996, arguing that their actions constituted libel, under Section 206 of the Criminal Code. The criminal proceedings were discontinued on 24 September 1996, on the ground that there were no reasons to believe that libel had been committed. The author's complaint against this decision was dismissed by the District Prosecutor of Sokolov on

31 December 1996, on the grounds that he did not properly substantiate his claims that the information spread by JD and TK was false, misleading and defamatory, and that there was no evidence that their actions could seriously harm the author's reputation.

2.12 The author filed a petition to the District Prosecutor of Sokolov requesting the Minister of Justice to lodge a complaint against a violation of law and requested the criminal proceedings to be continued. The author's petition was referred for review to the Regional Prosecutor of Pilsen who, on 18 April 1997, affirmed the 31 December 1996 decision. The author sent two new petitions to the Minister of Justice, which were referred to the Senior Prosecutor of Prague and then to the Regional Prosecutor of Pilsen, who discontinued the case on 14 October 1997, on the grounds that the petitions did not reveal any new facts. The author then requested the Senior Prosecutor of Prague to examine the legality of the 18 April 1997 decision of the Regional Prosecutor of Pilsen. On 5 January 1998, the Senior Prosecutor of Prague concluded that no errors were found in the challenged decision and that it was correct.

The complaint

3.1 The author claims to be a victim of a violation of article 25 (c), read in conjunction with article 26, of the Covenant, because the Regional Court and Regional Prosecutor of Pilsen rejected his job application by reference to the unsatisfactory results of his personality test, thereby violating his right to access to public service on general terms of equality. He claims that the law does not define any psychological criteria for the post concerned, and that other job applicants with the same qualifications were not required to undergo similar tests.

3.2 The author further claims that the decision of the Constitutional Court of 6 September 1994, which rejected his constitutional complaint against the decision of the Regional Prosecutor of Pilsen turning down his job application, violated his right to an effective remedy under article 2, paragraph 3 (b), because the Constitutional Court did not categorise the disputed decision as an "interference by a public authority", thereby preventing him from challenging it by means of a constitutional complaint.

3.3 The author contends that the ordinary courts handling his action for the protection of personal rights violated his right to an effective remedy under article 2, paragraph 3 (b), of the Covenant, and his right to protection against unlawful attacks on his honour and reputation safeguarded by article 17 of the Covenant, because they did not consider his request that the actions of JD and TK should be classified as libel under Section 206 of the Criminal Code.

3.4 The author claims that the Constitutional Court, by rejecting his complaint on the ground of lack of legal representation, violated his right to an effective remedy under article 2, paragraph 3 (b), of the Covenant, because he was a member of the Bar Association.

3.5 Finally, the author contends that the Supreme Court decision of 23 February 1999, in dismissing his petition for appellate review of the Regional Court's resolution of 13 August 1996, violated his right to an effective remedy under article 2, paragraph 3 (b), because the decision was unlawful and the criteria for admissibility of appellate review petitions as defined in the Code of Civil Procedure were inconsistent with international instruments binding on the State party.

State party's submission on the admissibility and merits of the communication

4.1 On 17 October 2002, the State party commented on the admissibility and merits of the communication. On the facts, and with regard to the author's job application, the State party points out that the author did not pass the judiciary exams and had never previously served as a judge. Consequently, the President of the Regional Court decided to take him on as a trainee judge. For this purpose, the author underwent a personality test, in accordance with the Justice Minister's instruction No. 125/1992-Inst, and on the basis of which he was found to be incapable of serving as a judge.

4.2 With regard to the first claim, the State party challenges the admissibility of this part of the communication. The State party notes that the basic criteria for submission of constitutional complaints were not fulfilled by the constitutional complaint of 7 April 1994, with the result that the Constitutional Court could not effectively examine the author's complaint. It follows that this remedy cannot be considered effectively exhausted. Furthermore, the claim of discrimination was not raised in the constitutional complaint, and no domestic remedies have been exhausted in regard of this claim. Keeping in mind the legal background of the author, the State party concludes that the author has not exhausted domestic remedies on this part of the communication, and that it should be declared inadmissible.

4.3 In addition, the State party argues that the communication is manifestly ill-founded. It refers to the Committee's general comment No. 25 and its jurisprudence[2] and recalls that for the purposes of the Covenant, not every differentiation of treatment will constitute discrimination, if the criteria for such differentiation are reasonable and objective, and if the aim is to achieve a purpose which is legitimate under the Covenant.

4.4 The State party asserts that article 25 cannot be understood as establishing a right to unlimited access to any public service post, but merely as a right to apply for appointment to public service positions on general terms of equality. The purpose of the statutory criteria for appointment is to guarantee consistent performance standards for persons holding such posts, not to establish the employer's obligation to appoint anyone who meets the criteria. Article 25 of the Covenant grants employers, including public authorities, the freedom to choose whether they will accept or reject a job application, even if it meets all the statutory criteria. However, article 26 requires that any distinctions leading to the rejection of applications for public service positions must pursue a legitimate purpose and be based on objective and reasonable criteria.

4.5 On the merits of the claim under article 25, the State party argues that the fact that the author's job applications were rejected by reference to the unsatisfactory results of his personality test cannot be understood as restricting his right of access to his country's public service, despite the fact that no psychological suitability criteria are explicitly mentioned in the relevant laws. The posts of a judge or prosecutor represent a highly significant social mission, associated with decisions on rights and duties, interferences with personal integrity and protection of the public interest. It is vital to ensure that such posts are held by people who not only possess the necessary qualifications and good moral character, but whose mental stability guarantees the proper exercise of their functions. Psychological suitability is thus an objective and reasonable criterion pursuing a legitimate aim. Its application to the author's case did not violate his right to access to public service under article 25 of the Covenant.

4.6 On the merits of the claim under article 26, the State party notes that the author's contention that other applicants were exempted from the personality test is not specific, and that it is unclear which applicants were exempted and under what circumstances. It points out that according to section 4 of the Justice Minister's Instruction No.125/92-Inst. concerning the training of trainee judges, every applicant for appointment as a trainee judge must undergo a personality test, and no exemptions are permitted. Since the author had never previously served as a judge, his psychological suitability had to be tested in accordance with this Instruction. He thus received the same treatment as any other applicant for a trainee judge position. He thus was not discriminated against.

4.7 The State party indicates that established practice requires all applicants for trainee prosecutor positions to undergo a personality test. After the trainee has completed the training period and passed the qualifying examination, he may be appointed as a prosecutor. Although the author had previously passed the qualifying examination, his situation was particular when he applied for a position in 1993, due to the fact that he had not worked at a prosecutor's office since 1968, and not taken a personality test, as required by the practice established in the meantime. Accordingly, the Regional Prosecuting Attorney decided to include him in the same selection process as other candidates, in order to make sure that he fulfilled the requirements. This decision cannot be understood as discriminating against the author. The State party concludes that there was no violation of articles 25 and 26 of the Covenant, and that the communication is manifestly ill-founded.

4.8 With regard to the second claim, relating to the decision of the Constitutional Court of 6 September 1994, the State party emphasises that Section 72, paragraph 1 (a), of Constitutional Court Act No. 182/1993 provides that a constitutional complaint may be lodged by a natural person who claims that his/her fundamental rights of freedoms safeguarded by a constitutional act has been violated as a result of a final decision in proceedings to which he/she was a party, or a measure or other interference by a public authority. The decision of the Regional Prosecutor of Pilsen does not fall into any of these categories, because he did not exercise his powers as defined in article 80, paragraph 1, of the Constitution and specified in Act No. 283/1993. He merely considered whether he should accept the author's application and enter into an employment relationship with him. Legally, both parties of the labour law relationship are equal, as is provided by the Labour Code, and the contract is a private one. As a result, the Regional Prosecutor's decision was not a decision impacting on the author's rights and duties and he did not act as a public authority in rejecting the job application. This decision can therefore not constitute a breach of the author's constitutional rights challengeable by a constitutional complaint under Section 72, paragraph 1 (a), of Act No. 182/1993. For the State party, this claim is manifestly ill-founded.

4.9 With regard to the third claim, relating to the manner in which the courts handled the issue of the protection of the author's rights, the State party submits that the author in fact requests the review of the judgement and the interpretation of domestic legislation by national courts and authorities taking part in the investigation. It considers that this part of the communication should therefore be declared inadmissible. On the merits, it indicates that on the one hand, the author filed a civil action in the Regional Court and High Court. As a result, his case was heard by civil divisions of these courts, which could not classify the actions as a crime. The State party submits that the Regional Court and the High Court found that the author had not substantiated his claims that JD was disseminating false, misleading or defamatory information about him; he was merely exercising his right to petition. With regard to TK, both courts considered that his articles did not contain false or misleading information. In addition, he did not intend to damage the author's reputation. It indicates that the competent public authorities thoroughly analysed the author's claims and concluded that JD's and TK's actions did not violate the author's personal rights. On the other hand, the criminal charges were dismissed as non-substantiated at the investigation phase. The case was therefore not taken to court. The State party concludes that the public authorities did not violate the author's right to an effective remedy under article 2, paragraph 3 (b), of the Covenant, and that this claim is manifestly ill-founded.

4.10 On the fourth claim[3], the State party argues that the author is in fact requesting the review of the interpretation of the domestic legislation by a national court, and that the communication should be declared inadmissible in this respect. On the merits, it indicates that under Section 30 of Constitutional Act No. 182/1993, a natural person who is party to Constitutional Court proceedings must be represented legally. In addition, according to the Constitutional Court's settled jurisprudence on legal representation, this requirement also applies to members of the Bar Association. The author's constitutional complaint did not meet this condition. The author was duly informed of the defect and granted an extension of the deadline to fulfil the condition, which he failed to do. In view of the importance of Constitutional Court proceedings, the purpose of mandatory legal representation is to ensure the proper defence of the rights of all parties by qualified lawyers and to guarantee a more objective view of the situation of individual parties to the case. Nothing prevented the author from choosing a qualified counsel within the time limits granted by the Constitutional Court. The State party concludes that the Constitutional Court did not violate the author's right to an effective remedy under article 2, paragraph 3 (b), of the Covenant.

4.11 On the fifth claim[4], the State party reiterates that the author requests the review of a judgement imposed by national courts and of the interpretation of domestic law by national courts. This part of the communication should be declared inadmissible. On the merits, the State party contends that the author's subjective view has no bearing on the objective validity of the grounds for appellate review. The Supreme Court examined the admissibility of the author's petition for appellate review and found that the case did not come under any of the grounds open for appellate review. It explicitly rejected the author's claim that the conditions for admissibility of appellate review petitions are inconsistent with international instruments binding on the State party. Accordingly, the Supreme Court's decision of 23 February 1999 did not violate the author's right to an effective remedy. The State party notes that in addition the author could have filed a constitutional complaint against this decision and thus failed to exhaust domestic remedies in this respect.

Author's comments

5.1 On 4 February 2003, the author commented on the State party's submissions. He claims that he has exhausted domestic remedies, as he brought a case concerning discrimination in the workplace and a case concerning the protection of personal honour and reputation before the Constitutional Court. To support his claim, he refers to decisions II ÚS 56/94 and I ÚS 341/96 of the Constitutional Court.

5.2 The author reiterates his claims that he was discriminated against in connection with his job applications, because he was required to undergo personality tests, when other applicants, who like the author had taken their legal examinations under the old system, were not required to do so. He reiterates that his rights to legal protection and fair trial were infringed when he was not granted support in his appeal for protection of his personal honour.

Additional observations by the State party and the author

6.1 On 22 May 2003, the State party submitted additional observations on admissibility. On the claim under article 26, it reiterates that the author failed to prove which applicants had been exempted from the duty to undergo a psychological examination, and for which positions they had applied, and when and under what circumstances they had been exempted. It is therefore impossible for the Government to reply to this claim, notwithstanding the fact that the relevant regulations do not allow for exemptions.

6.2 With reference to the author's allegation that the national authorities did not deal with his claim of non-objectivity of the tests, the State party argues that the Ministry of Justice responded to this objection on 22 December 1993. The author did not raise any further objections with regard to the objectivity of the tests, in particular in his constitutional complaint. This claim should therefore be declared inadmissible for non-exhaustion of domestic remedies.

6.3 On the exhaustion of domestic remedies, the State party reiterates that although the author brought his cases to the Constitutional Court, they were rejected as inadmissible, and that it had therefore not dealt with the merits of the case.

7.1 On 17 January 2005, the author commented on the State party's additional observations. He indicates that in 1993, after he was considered incapable of performing the function of public prosecutor or judge after the unsuccessful personality tests, Dr. Š. and Dr. K. were granted positions in the civil-legal department of the County court without having taken personality tests. The author acknowledges that at that moment, he had not worked in the area of criminal law for twenty years, had not studied the numerous post-revolutionary amendments, and therefore needed training. He claims, however, that this was abused in such a manner that he was qualified as a legal clerk, so that he could be subjected to personality tests. As he had recently undergone tests for risk professions and completed them successfully, he agreed to take the personality tests.

7.2 The author argues that when he received the results of the tests, he raised the issue of their objectivity with the authorities, including in article 2 of his constitutional complaint of 7 April 1994.

8.1 On 18 October 2005, the State party commented on the author's further submission. On the claim of discrimination in the selection of application for employment in the judiciary and the author's new information on other applicants (Dr. Š. And Dr. K.), it submits that the District Court has no record of a written application by the author for a position as a judge in that Court, and that he was therefore not in the same situation as Dr. Š. And Dr. K., who did lodge such an application and were subsequently accepted as employees of the District Court. The State party adds a detailed account on the difference of situations of the author and the other applicants, who had both already previously served as judges (one of them for 15 years), and argues that the difference in treatment is justified in different situations, and that in any case the differential treatment was based on objective and reasonable grounds. The State party concludes that there was no unjustified discrimination of the author within the meaning of article 26.

8.2 With regard to the author's application for a position as prosecutor, the State party acknowledges that the author passed the final tests for judicial trainees in 1966, and that he worked as a state prosecutor from 1 September 1966 to 31 March 1970. However, the State party considers that the chief prosecutor's decision to subject him to a personality test was justified. The author only held the position of prosecutor for 3 and half years, and 23 years passed between the moment he started working on a different position and the date of his new application. Because the chief prosecutor considered that the author's professional experience did not provide sufficient guarantees that he would perform the work properly, he decided to subject the author to the identical admission process as all the other candidates. This included a personality test. Exempting the author from the test would have constituted an unjustified advantage in his favour, to the detriment of the other candidates. Finally the State party reiterates that the author has not provided any information on applicants who were accepted without undergoing the personality tests. The State party concludes that there was no discrimination against the author.

9.1 On 28 December 2005 and 16 January 2006, the author commented on the State party's submission. He indicates that in 1989, the Attorney-General sought to appoint him as chief prosecutor in Sokolov, without subjecting him to a personality test. He was not appointed because he had to undergo an eye operation. In 1993, when he was removed from the post of Director of Sokolov Labour Office, he applied for a position as a judge. Approximately one month after Dr. K. had been appointed as a judge in the Sokolov District Court, the author contacted the presiding judge of that court, who informed him that the civil section of the District Court already had a sufficient number of judges, and who advised him to apply to the Regional Court in Pilsen instead.

9.2 The author reiterates that applicants for the positions as a judge or prosecutor, who, like him, formerly completed a judicial or attorney examination and held a legal position, were accepted in the judiciary without any requirement of a personality test. The author reaffirms that, apart from himself, no other applicants from the same category as himself had to take personality tests. He explains that he cannot consult documents relating to personnel issues of judges appointed after 1 January 1993, to examine whether they indeed underwent a personality test. However, it is public knowledge that many judges were exempted from the test.

9.3 The author indicates that he did not wish to work at the Regional Court of Pilsen, but that he applied for a position at the District Court, like Dr. Š. and Dr. K. The State party's argument that he worked in a different profession for 23 years is misleading, as most of that time he worked as a company lawyer, and acquired extensive experience in economic, financial, administrative, civil, labour and housing law. Acquired experience and examinations for any profession in the fields of advocacy, judiciary or prosecution are mutually recognized. As a result, candidates from one branch would not need to undergo another examination and personality test if they seek to move to one of the other branches.

10. On 19 June 2006, the State party commented on the author's observations and reiterated its previous submissions.

Issues and proceedings before the Committee

Consideration of admissibility

11.1 Before considering any claim contained in a communication, the Human Rights Committee must, in accordance with rule 93 of its Rules of Procedure, decide whether or not the communication is admissible under the Optional Protocol to the Covenant.

11.2 The Committee has ascertained that the same matter is not being examined under another procedure of international investigation or settlement for purposes of article 5, paragraph 2 (a), of the Optional Protocol.

11.3 With regard to the first claim of a violation of the right to access public service without discrimination, under article 25 (c), read in conjunction with article 26, the Committee has noted the State party's contention that the author has not exhausted domestic remedies on this claim. However, it also notes that the author claims to have raised this issue in his constitutional complaint of 7 April 1994[5]. The fact that the complaint was not considered by the Constitutional Court on the merits does not in itself preclude the Committee from examining the communication. The State party has not provided information about other remedies the author could have availed himself of. In addition, it has not submitted any translation of the complaint or the judgement of the Constitutional Court, which would have allowed the Committee to consider if the claim had indeed been raised by the author as he claims. Accordingly the Committee considers that the author has exhausted domestic remedies in respect of this claim, and that it is not precluded from considering this part of the communication pursuant to article 5, paragraph 2 (b), of the Optional Protocol.

11.4 The Committee recalls that article 25 (c) of the Covenant confers a right of access, on general terms of equality, to public service, and thus, in principle, the claim falls within the scope of this provision in this respect.[6] With respect to the author's application for a position as a judge in the Regional Court, the Committee considers, however, that it does not appear that the author's situation, on the one hand, and the situation of Dr.Š. and Dr. K. on the other hand, were similar, and that they should have received the same treatment. It notes, in particular, that the latter had both previously served as judges at the time of the application, while the author himself had not. The Committee therefore finds that the author has failed to substantiate, for purposes of admissibility, his claim relating to the application to a position as a judge.

11.5 With respect to the author's application for a position as a prosecutor, the Committee notes that the author previously passed the necessary tests for serving as a prosecutor, and actually held that position. It therefore considers that his situation was different in comparison with other applicants, who would never have held such a position. However, the author has not demonstrated that any applicants in the same position as himself were exempted from the personality test. The Committee finds that the author has failed to substantiate this claim for purposes of admissibility. It concludes that the author's claims under article 25 (c), read together with article 26, of the Covenant are inadmissible under article 2 of the Optional Protocol.

11.6 On the author's second and fourth claims that he was denied the right to an effective remedy because the Constitutional Court declared his complaints inadmissible, the Committee recalls its jurisprudence[7] that article 2 is of an accessory character and can only be invoked in conjunction with claims of a violation of another substantive right protected by the Covenant.

The Committee observes that the claim that the author did not receive an effective remedy although he failed to fulfil the conditions of legal representation is not linked to a claim of violation of any other right of the Convention. On the claim of a violation of article 2, paragraph 3, read together with articles 25 and 26, the Committee recalls its jurisprudence[8] that article 2, paragraph 3, requires that in addition to effective protection of Covenant rights, States parties must ensure that individuals have accessible, effective and enforceable remedies to vindicate those rights. The Committee further recalls that this article only provides protection to alleged victims if their claims are sufficiently well-founded to be arguable under the Covenant. Considering that the author of the present communication has failed to substantiate, for purposes of admissibility, his claims under articles 25 and 26, his allegation of a violation of article 2 of the Covenant is also inadmissible under article 2 of the Optional Protocol.

11.7 On the author's third and fifth claims in relation to the findings of the domestic courts on his claims of defamation, the Committee reiterates its jurisprudence that it is not an appellate court and that it is generally for the courts of States parties to the Covenant to evaluate facts and evidence in a particular case, unless it can be ascertained that it is clearly arbitrary or amounts to a denial of justice[9]. The Committee considers that the author has failed to substantiate, for purposes of admissibility, any such exceptional elements in his own case. This part of the communication is therefore inadmissible under article 2 of the Optional Protocol.

12. The Committee therefore decides:

(a) That the communication is inadmissible under article 2 of the Optional Protocol;

(b) That this decision shall be communicated to the author and to the State party.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently to be issued in Arabic, Chinese and Russian as part of the Committee's annual report to the General Assembly.]

Notes

[1] The Covenant was ratified by Czechoslovakia in December 1975 and the Optional Protocol in March 1991. The Czech and Slovak Federal Republic ceased to exist on 31 December 1992. On 22 February 1993, the Czech Republic notified its succession to the Covenant and the Optional Protocol.

[2] Communications No. 359/1990, *Sprenger v. The Netherlands*, Views adopted on 31 March 1992, paragraph 7.4; No. 172/1984, *Broeks v. The Netherlands*, Views adopted on 9 April 1987, and No. 182/1984, *Zwaan-de Vries v. The Netherlands*, Views adopted on 9 April 1987.

[3] See above para. 3.4.

[4] See above para. 3.5.

[5] See para. 5.1 above.

[6] See communication No. 972/2001, *George Kazantzis v. Cyprus*, decision on admissibility of 7 August 2003, para. 6.4.

[7] See communication No. 275/1988, *S.E. v. Argentina*, decision on admissibility of 26 March 1990, para. 5.3.

[8] See communication No. 972/2001, *George Kazantzis v. Cyprus*, decision on admissibility of 7 August 2003, para. 6.6.

[9] See communication No. 541/1993, *Errol Simms v. Jamaica*, Decision of 3 April 1995, para. 6.2.

H. Communication No. 1078/2002, *Yurich v. Chile*

(Decision adopted on 1 November 2005, eighty-fifth session)*

Submitted by: Norma Yurich (not represented by counsel)

Alleged victim: The author and her daughter, Jacqueline Drouilly Yurich

State party: Chile

Date of communication: 10 July 2001 (initial submission)

Subject matter: Enforced disappearance of the author's daughter

Procedural issues: Inadmissibility *ratione temporis*; non-exhaustion of domestic remedies

Substantive issues: In respect of the author, violation of the right to physical safety and family life; in respect of her daughter, violation inter alia of the right to life and denial of justice

Articles of the Covenant: Articles 5; 6, paragraphs 1 and 3; 7; 9, paragraphs 1 to 4; 10, paragraphs 1 and 2; 12, paragraph 4; 13; 14, paragraphs 1 to 3 and 5; 16; 17, paragraphs 1 and 2; 18, paragraph 1; and 26 of the Covenant

Articles of the Optional Protocol: Articles 1 and 5, paragraph 2 (b)

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 2 November 2005,

Adopts the following:

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* The following members of the Committee participated in the examination of the present communication: Mr. Nisuke Ando, Mr. Prafullachandra Natwarlal Bhagwati, Mr. Alfredo Castillero Hoyos, Ms. Christine Chanet, Mr. Maurice Glèlè Ahanhanzo, Mr. Edwin Johnson, Mr. Walter Kälin, Mr. Ahmed Tawfik Khalil, Mr. Rajsoomer Lallah, Mr. Michael O'Flaherty, Ms. Elisabeth Palm, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Ivan Shearer, Mr. Hipólito Solari-Yrigoyen, Ms. Ruth Wedgwood and Mr. Roman Wieruszewski.

The text of an individual opinion of Committee members, Ms. Christine Chanet, Mr. Rajsoomer Lallah, Mr. Michael O'Flaherty, Ms. Elizabeth Palm and Mr. Hipólito Solari-Yrigoyen is appended to the present document.

Decision on admissibility

1.1 The author of the communication is Ms. Norma Yurich, a Chilean national, who submits it on her own behalf and that of her missing daughter, Jacqueline Drouilly Yurich, a student, born in 1949. She alleges violations by Chile of articles 5; 6, paragraphs 1 and 3; 7; 9, paragraphs 1 to 4; 10, paragraphs 1 and 2; 12, paragraph 4; 13; 14, paragraphs 1 to 3 and 5; 16; 17, paragraphs 1 and 2; 18, paragraph 1; and 26 of the Covenant. The author is not represented by counsel.

1.2 The International Covenant on Civil and Political Rights entered into force for the State party on 23 March 1976, and the Optional Protocol on 28 August 1992.

The facts of the case

2.1 According to the author, on 30 October 1974 eight individuals, armed and dressed in plain clothes, who identified themselves verbally as agents of the National Intelligence Directorate (DINA), came to the house of the sister of Marcelo Salinas, the husband of Jacqueline Drouilly, in Santiago, and asked her where Salinas lived. The agents then went to Marcelo Salinas' home and, on discovering that he was not there, arrested Jacqueline Drouilly, who was pregnant at the time. She has been missing since then. Jacqueline Drouilly and her husband, who was himself arrested the following day, were members of the Movimiento de Izquierda Revolucionaria (MIR).

2.2 Two days later the same individuals went back to the house together with Marcelo Salinas, who was handcuffed, and took away various items belonging to the couple. A few days later, two men in plain clothes who identified themselves as military intelligence officers, came to the house and took away clothing, supposedly for the couple.

2.3 The author annexes copies of the testimony of two individuals who state that they were detained in late October and early November 1974 in a DINA detention centre in the calle José Domingo Cañas, in the municipality of Ñuñoa, Santiago. They also state that Jacqueline Drouilly and her husband were being held there and being subjected to torture, and that they were all transferred on or around 10 November 1974 to the Cuatro Alamos detention centre.

2.4 The author also provides a statement made on 16 August 1999 by a person who had been arrested in November 1974 by DINA agents, and who claims to have spent a period of detention in the Cuatro Alamos detention centre (Vicuña Mackenna and Departamental sector) in Santiago. During that period, between November and December 1974, this person shared a cell with Jacqueline Drouilly and testifies to having seen the author and her husband being taken out of their cells by DINA agents one night in late December 1974; the person never saw them again. Other witnesses stated that they saw Jacqueline Drouilly after 20 November 1974 in the detention centre known as the Villa Grimaldi, after which she was said to have returned to Cuatro Alamos.

2.5 On 11 November 1974 the author filed an application for *amparo* with the Santiago Appeal Court (case No. 1390). On 29 November 1974 the Court declared the case out of order and referred it to the 11th Criminal Court for investigation.

2.6 On 9 December 1974, proceedings for presumed misadventure were brought in the 11th Criminal Court, Santiago (case No. 796-2), but the investigations failed to establish Jacqueline Drouilly's whereabouts. On 31 January 1975 the case was dismissed. That decision was upheld on appeal by the Santiago Appeal Court.

2.7 On 26 February 1975 the author filed a further application for *amparo* with the Santiago Appeal Court (case No. 294). By memorandum of 17 March 1975 the Ministry of the Interior informed the Court that that person was not being held on Ministry orders. The same information was provided once more in June 1975. On 13 June 1975 the Court rejected the application and referred the case to the relevant criminal court for investigation. On 19 June 1975 presumed misadventure proceedings were brought in the 11th Criminal Court, Santiago (case No. 2681). After some months the case was dismissed. On 16 July 1975, while the above proceedings were ongoing, the author brought a complaint for the abduction of Jacqueline Drouilly and Marcelo Salinas before the same court. This complaint was initially registered as No. 2994 but was later joined to the presumed misadventure case as No. 2681-4. The case was dismissed on 31 March 1976, since no offence could be shown to have been committed. On appeal, on 18 June 1976, the Appeal Court upheld the dismissal. On 3 October 1975 the author again filed an application for *amparo* with the Appeal Court (case No. 1263), citing the fact that Jacqueline Drouilly had been pregnant at the time of her arrest. The application was declared out of order on 20 October 1975 and this decision was upheld on appeal by the Supreme Court on 27 October 1975.

2.8 Jacqueline Drouilly was among those named in a complaint for mass abduction filed on 28 May 1975 with the Santiago Appeal Court in respect of 163 disappeared persons and containing a request for an inspecting magistrate to be appointed to take charge of the investigations. The request was rejected. It was resubmitted in July and August 1975, this time to the Supreme Court, but was again rejected.

2.9 The author also states that a criminal complaint was filed with the Santiago Appeal Court on 29 March 2001, for the disappearance of more than 500 members of MIR, including Jacqueline Drouilly. The author alleges unreasonably lengthy proceedings.

The complaint

3.1 The author alleges that her daughter was a victim of violations of articles 5; 6, paragraphs 1 and 3; 7; 9, paragraphs 1 to 4; 10, paragraphs 1 and 2; 12, paragraph 4; 13; 14, paragraphs 1 to 3 and 5; 16; 17, paragraphs 1 and 2; 18, paragraph 1; and 26 of the Covenant.

3.2 In her own case, she states that the search for her daughter, missing for so many years, has affected her physical and mental health, and that as a result she suffers from depressions and cardiac problems which have necessitated the insertion of a pacemaker. Her family situation has also been affected, her husband and her other two children having been obliged to leave the country out of fear. The author states that this amounts to constant torture (art. 7).

3.3 As to the investigation into her daughter's disappearance, the author alleges a denial of justice. Moreover, the continuing applicability of Decree Law No. 2191 on Amnesty, of 1978, has prevented those responsible from being brought to trial.

State party's submissions on admissibility and on the merits; author's comments

4.1 In its comments of 25 May 2004, the State party maintains that, although the author has submitted the communication on her own and her daughter's behalf, the allegations upon which it is based relate to violations of Covenant rights only in respect of the daughter. Consequently, the State party takes the view that the communication has in fact been submitted on behalf of Jacqueline Drouilly. The information collected over a period of years by State bodies, human rights organizations and the courts shows that she was last seen alive in or around January or March 1975, when being held incommunicado in the Cuatro Alamos compound, for which the now defunct DINA was responsible. Consequently, the communication submitted by the author should be declared inadmissible *ratione temporis*, since the events on which it is based occurred or commenced prior to the entry into force for Chile of the Optional Protocol.

4.2 Upon ratification of the Protocol, Chile made the following declaration: "In recognizing the competence of the Human Rights Committee to receive and consider communications from individuals, it is the understanding of the Government of Chile that this competence applies in respect of acts occurring after the entry into force for that State of the Optional Protocol or, in any event, to acts which began after 11 March 1990." This declaration applies notwithstanding the argument that the denial of justice continues to be perpetrated by court rulings handed down after 11 March 1990, since the events giving rise to the communication commenced on 30 October 1974 and therefore took place prior to 23 March 1976, the date of the international entry into force of the Covenant.

4.3 As to the complaint brought by the author on her own behalf, this is of a general nature. The author fails to demonstrate how her rights under the Covenant have been violated by the State or to show that available domestic remedies have been exhausted.

4.4 The State party recalls the Committee's decisions on communications Nos. 717/1996 (Acuña Inostroza), 718/1996 (Vargas), 740/1997 (Barzana Yutronic) and 746/1997 (Menanteau and Vásquez), in respect of Chile, which it found inadmissible for those reasons.

4.5 As to the merits, the State party argues that there has been no violation of the Covenant. On 17 July 1996, the National Reparation and Reconciliation Board asked for the investigation to be reopened but this inquiry, too, was closed in December 1997. At the time of submission of the State party's comments, the trial of three former DINA agents was ongoing in the Santiago Appeal Court in respect of a criminal complaint filed by the father of Jacqueline Drouilly for aggravated abduction. Also ongoing in the same Court were proceedings in respect of a criminal complaint filed by the College of Social Work for the abduction of several of its members, including Jacqueline Drouilly.

4.6 The National Truth and Reconciliation Commission found that Jacqueline Drouilly and her husband Marcelo Salinas were victims of serious human rights violations by agents of the State. The State party explains the policies of Chile's democratic governments on human rights violations, including enforced disappearances, committed under the previous regime. It states, inter alia, that the Ministry of the Interior's Human Rights Programme is cooperating in investigations into some 300 cases of human rights violations, including the disappearance of Jacqueline Drouilly.

4.7 The Decree Law on Amnesty, of 1978, extinguishes the criminal responsibility of perpetrators and of accessories to or after the fact, in respect of offences committed in Chile during the state of siege in force between 11 September 1973 and 10 March 1978. For many years the Supreme Court used to confirm lower court judgements dismissing cases under this Decree Law, applying case law which held that the court was not in a position to investigate the facts and identify those responsible for the offence. A substantive shift could be seen in judicial practice beginning in 1998, since when the Supreme Court, applying article 413 of the Code of Criminal Procedure, has repeatedly ruled that a case can be dismissed only on completion of the investigation to establish whether a crime has been committed and identify the perpetrator.

4.8 In the case of detainees who disappeared or were executed and whose remains were not recovered, the Supreme Court has accepted the opinion that such persons should be deemed to have been abducted within the meaning of article 141 of the Criminal Code. Since case law holds that abduction is an ongoing offence or an offence with ongoing effect, i.e., one that continues over time until the victim is found alive or dead, any application or decision on amnesty is deemed untimely unless one of those conditions is met. Until the date of the person's release or death is established, it cannot be established in law up to what precise date they were deprived of their liberty. If such deprivation of liberty continues beyond the period covered by the Decree Law, i.e., 11 September 1973 to 10 March 1978, amnesty cannot be granted in the case in question.

4.9 On this basis, the Supreme Court has revoked the dismissal rulings applying the Decree Law on Amnesty, resumed investigations into human rights violations and brought those involved to trial. Moreover, the Supreme Court has ruled that a final sentence dismissing a case of illegal detention cannot be exempted as *res judicata*.

4.10 In parallel, the Ministry of the Interior's Human Rights Programme has taken the position that, in applying the Decree Law, it should be interpreted in such a way that it will cease to present an insurmountable obstacle to attempts to establish the truth and identify criminal responsibility for the offences under investigation. The Programme's position is that amnesty is not applicable to crimes which are not open to amnesty in international humanitarian law, such as crimes against humanity, war crimes and enforced disappearance.

5. In her comments of 22 September 2004, the author points out that she named her daughter's abductor in her statements to the National Truth and Reconciliation Commission but no proceedings were brought under President Aylwin's Government. Not until President Lagos took office were cases of human rights violations reopened. The offence committed against her daughter is an ongoing crime, not subject to amnesty or the statute of limitations. Under the rules as currently applied, the trial court needs the very people responsible to state the presumed exact date of the victim's death, whereupon the abduction becomes homicide, a crime prescriptible after 15 years. This amounts to giving the court itself the right to decide the presumed date of death, despite the absence of a body. The author is critical of this state of affairs, which in her view favours the perpetrators and does not ensure justice for the victims.

Issues and proceedings before the Committee

6.1 Before considering any claim contained in a communication, the Human Rights Committee must, in accordance with rule 93 of its rules of procedure, decide whether or not the communication is admissible under the Optional Protocol to the Covenant.

6.2 The author claims that her daughter's detention in October 1974 and her subsequent disappearance violate several provisions of the Covenant. The State party argues that the communication should be declared inadmissible *ratione temporis*, since the events upon which it is based occurred or commenced prior to the entry into force for Chile of the Optional Protocol. The State party also recalls that upon ratifying the Optional Protocol it made a declaration to the effect that the Committee's competence applied only in respect of acts occurring after the entry into force for Chile of the Optional Protocol or, in any event, acts which began after 11 March 1990.

6.3 The Committee notes that the facts complained of by the author in connection with her daughter's disappearance occurred prior to the entry into force not only of the Optional Protocol but also of the Covenant. The Committee recalls the definition of enforced disappearance contained in article 7, paragraph 2 (i), of the Rome Statute of the International Criminal Court: *"Enforced disappearance of persons" means the arrest, detention or abduction of persons by, or with the authorization, support or acquiescence of, a State or a political organization, followed by a refusal to acknowledge that deprivation of freedom or to give information on the fate or whereabouts of those persons, with the intention of removing them from the protection of the law for a prolonged period of time.* In the present case, the original acts of arrest, detention or abduction, as well as the refusal to give information about the deprivation of freedom - both key elements of the offence or violation - occurred before the entry into force of the Covenant for the State party.

6.4 Furthermore, upon the submission of the communication, the State party, far from refusing to acknowledge the detention, admitted and assumed responsibility for it. In addition, the author makes no reference to any action of the State party after 28 August 1992 (the date on which the Optional Protocol entered into force for the State party) that would constitute a confirmation of the enforced disappearance. Accordingly, the Committee considers that even if the Chilean courts, like the Committee, regard enforced disappearance as a continuing offence, the State party's declaration *ratione temporis* is also relevant in the present case. In the light of the foregoing, the Committee finds that the communication is inadmissible *ratione temporis* under article 1 of the Optional Protocol. The Committee does not deem it necessary, therefore, to address the question of the exhaustion of domestic remedies.

6.5 The author argues that the search for her missing daughter has had an adverse effect on her physical and mental health and her family life, which amounts to a violation of her rights under the Covenant, notably article 7. The State party considers these claims to be of a general nature and that domestic remedies have not been exhausted in this regard. The Committee notes that the author has not demonstrated that she has availed herself of such remedies. The Committee therefore finds this part of the communication inadmissible under article 5, paragraph 2 (b), of the Optional Protocol.

7. Consequently, the Human Rights Committee decides:

(a) That the communication is inadmissible under articles 1 and 5, paragraph 2 (b), of the Optional Protocol;

(b) That this decision shall be communicated to the State party and to the author of the communication.

[Adopted in English, French and Spanish, the Spanish text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the Committee's annual report to the General Assembly.]

APPENDIX

Individual, dissenting, opinion of Committee members Ms. Christine Chanet, Mr. Rajsoomer Lallah, Mr. Michael O'flaherty, Ms. Elisabeth Palm and Mr. Hipólito Solari-Yrigoyen

In order to shed new light on the question of enforced disappearances, the Human Rights Committee bases itself (para. 6.3) on the definition given in the Rome Statute of the International Criminal Court, a definition that differs from the one contained in the draft international convention for the protection of all persons from enforced disappearances.

According to the Committee, this definition includes two fundamental elements of the violation: the initial act of arrest, detention or abduction, and a refusal to acknowledge that deprivation of freedom.

By endorsing these criteria, which pertain to another international treaty, the Committee overlooks the fact that it must apply the Covenant, the whole Covenant and nothing but the Covenant.

Article 9, paragraph 1, of the Covenant provides that "everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law". Furthermore, article 16 of the Covenant stipulates that "everyone shall have the right to recognition everywhere as a person before the law".

In the present case, the acts of arrest, detention or abduction were committed without the State, which does not contest them, being in a position, consistent with article 16, to determine the actual situation of the disappeared person.

Disappearance, as the Committee itself indicates in paragraph 6.4 of its decision, constitutes a continuing violation. The continuing nature of this violation precludes the application of the exception *ratione temporis* and of the reservation of Chile, insofar as the latter cannot exclude the competence of the Committee with regard to ongoing violations.

The solution adopted by the Committee entails discharging the State of its responsibility for the sole reason that the State does not deny the criminal acts, as demonstrated by the fact that it has taken no action to "confirm" the enforced disappearance. This analysis could be applied to acts that fall within the scope of the Rome Statute, but it cannot prevail in the framework of articles 9 and 16 of the Covenant, since the issue involves continuing violations of those two provisions.

Indeed, to evade its responsibility, the State cannot limit itself to adopting an attitude of passive consent: it must provide evidence that it has used all available means to determine the whereabouts of the disappeared person. This was not done in the present case, and the undersigned cannot agree that there has been no violation of the Covenant.

(*Signed*): Christine Chanet

(*Signed*): Rajsoomer Lallah

(*Signed*): Michael O'Flaherty

(*Signed*): Elisabeth Palm

(*Signed*): Hipólito Solari-Yrigoyen

[Done in English, French and Spanish, the French text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the Committee's annual report to the General Assembly.]

I. Communication No. 1093/2002, *Rodríguez José v. Spain*
(Decision adopted on 25 July 2006, eighty-seventh session)[*]

Submitted by: Mr. José Manuel Rodríguez Alvarez (not represented by counsel)

Alleged victim: The author

State party: Spain

Date of communication: 15 July 1999 (initial submission)

Subject matter: Non-extension of the author in his post as counsellor to the Supreme Court

Procedural issues: Lack of substantiation; case submitted under another procedure of international investigation or settlement; non-exhaustion of domestic remedies

Substantive issues: Right to a hearing with all due guarantees by an independent and impartial tribunal; access, in general conditions of equality, to public office

Articles of the Covenant: 14, paragraph 1; 25 (c) and 26

Articles of the Optional Protocol: 2; 5, paragraphs 2 (a) and (b)

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 25 July 2006,

Adopts the following:

Decision on admissibility

1. The author of the communication of 15 July 1999, Mr. José Rodríguez Alvarez, a Spanish national, claims to be a victim of a violation by Spain of articles 14, paragraph 1; 25 (c) and 26 of the International Covenant on Civil and Political Rights. He is not represented by counsel.

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[*] The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Nisuke Ando, Mr. Prafullachandra Natwarlal Bhagwati, Mr. Maurice Glèlè Ahanhanzo, Mr. Edwin Johnson, Mr. Walter Kälin, Mr. Ahmed Tawfik Khalil, Mr. Rajsoomer Lallah, Ms. Elisabeth Palm, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Ivan Shearer and Mr. Hipólito Solari-Yrigoyen.

Factual background

2.1 The author was appointed counsellor to the Supreme Court by decision of the General Council of the Judiciary (CGPJ) of 24 July 1991, following a competitive examination held for the purpose. He took up his position on 1 October 1991. Under the law, the appointment was for a period of three years renewable for a further three, and the post was governed by public service statute.[1]

2.2 On the written proposal of his superior, the Chief Magistrate of the Technical Office of the Supreme Court, on 31 May 1994 the author applied for a three-year extension. On 26 July 1994, the same superior submitted a report on his work in which he spoke of "outstanding professional competence, efficiency and a spirit of service". On 5 October 1994 the CGPJ agreed to extend the appointment of certain counsellors but not of others. The author was among the latter. No reason was given for that decision, which was based on a proposal of the Administrative Division of 21 July 1994, which in turn put forward no reason for the difference in treatment and had not been preceded by any report justifying the proposal not to extend certain counsellors, precisely all those attached at the time to the Chamber for Contentious Administrative Affairs. The Council's decision made no reference to the main evidence supplied by the author, namely the positive report of his superior.

2.3 The author contends that the decision of the CGPJ attempts to justify the failure to extend by presumed discretionary powers enjoyed by the decision-making body, founded on the temporary nature of the employment relationship. Those posts, although temporary, are not discretionary posts; rather, they are filled by open competition among public officials. Even allowing that the Administration did enjoy the discretionary power to grant or not grant extensions, the law provides that grounds for the decision must be stated.

2.4 In response to the decision of the CGPJ, on 22 October 1994 the author filed a contentious-administrative application under Law 62/1978 on jurisdictional protection of fundamental rights before the Chamber for Contentious Administrative Affairs of the Supreme Court. On 1 March 1995, the Court dismissed the application on the ground that the Constitution had not been violated and that the issues raised had to be resolved via the administrative litigation procedure. The author filed an appeal before the same Court, which was dismissed on 24 April 1995. The Court deemed that the issue raised by the author did not affect his fundamental rights, but concerned a problem of ordinary legality, which could not be settled through the procedure in Law 62/1978.

2.5 On 5 July 1995 the author appealed to the Constitutional Court, alleging a violation of the principle of equality, of the right to access to public posts and functions on an equal footing and of the right to effective judicial protection. The latter was based on the alleged procedural irregularities that occurred in the Supreme Court, which had admitted the written statements of the State Public Prosecutor and the Office of the Attorney-General outside the deadline. The Court declared the appeal inadmissible on 28 October 1996, on the ground that it did not refer to an infringement of fundamental rights. The Court found that, given the temporary nature of the author's links to the Supreme Court, the CGPJ had a broad margin in which to award the extension and that the author had no unconditional right to it. The author claims that the Constitutional Court did not take into account the main evidence submitted, that of his superior's positive report on his work. Moreover, the Court based its decision on the discretionary power to extend the author's services. However, the author contends that Spanish law requires that grounds for discretionary acts should be stated.[2]

2.6 On 16 March 1997 the author lodged a complaint with the European Commission of Human Rights. In a letter dated 24 March 1997, the Secretariat of the Commission wrote to the author as follows:

> "Pursuant to the general instructions received from the Commission, I hereby inform you of certain obstacles that your application may encounter. The purpose of these remarks is not to anticipate the content of an eventual decision, which may only be adopted by the Commission itself, but rather to inform you, in the light of its case law and praxis, of the admissibility requirements and the possibilities for success of your appeal.
>
> "I must inform you that, according to constant case law of the Commission, in principle, lawsuits relating to access to the public service, promotion and dismissals do not fall under the category of civil obligations, except in those cases having an unequivocal patrimonial content.
>
> "Consequently, the Commission would probably be obliged to declare your appeal inadmissible. Hence, failing new information from you, your appeal will not be registered or submitted to the Commission."

The complaint

3.1 The author states that the systematic concealment of the essential evidence submitted by him is presumptive evidence of a violation of his right to a public hearing by a competent, independent and impartial tribunal, as set out in article 14, paragraph 1, of the Covenant, all the more so when the decision of the Council lacked any grounds.

3.2 The author also pleads violation of articles 25 (c) and 26 of the Covenant, considering the fact that certain public servants were extended and not others, without any reasons being given, to be discriminatory. The situation was made worse by the fact that the author was the only one of them to fulfil all the necessary merit and competence requirements, since the fact that he had discharged his duties with outstanding technical competence, efficiency and spirit of service had been documented.

State party's observations on admissibility and author's comments

4.1 In comments of 2 December 2002, the State party states that the author had two types of remedy at his disposal for challenging the decision of the CGPJ: a special preferential and summary procedure, governed by Law 62/78 for securing protection of fundamental rights, and an ordinary remedy designed for securing nullity of an act owing to legal irregularities. They may both be sought simultaneously. This averts the risk of invoking a special remedy, which may be declared inadmissible if it does not concern violation of fundamental rights but of legality, whereupon it is too late to invoke the ordinary remedy.

4.2 The author invoked only a special remedy, which was declared inadmissible because the competent bodies did not deem it to be the appropriate avenue for settling that dispute.

The State party concludes that the author did not duly exhaust domestic remedies, and that consequently the communication must be considered inadmissible under article 5, paragraph 2 (b), of the Protocol. In addition, the decisions whereby the remedies were declared inadmissible were not arbitrary, nor did they constitute a denial of justice.

5.1 In his comments of 7 March 2003, the author asserts that his complaint had an indisputable content of fundamental rights, these being access to a public post in conditions of equality. However, the Supreme Court and the Constitutional Court did not address the case from that perspective, merely pointing out that the matter was one of ordinary legality that needed to be tried via an ordinary remedy. This does not mean that the complaint does not have to contain a fundamental aspect or that the courts have not also violated procedural rights, since the issues raised were not addressed when the remedy was processed.

5.2 Contrary to the claims of the State party, the author contends that he also exhausted the ordinary remedy, since he submitted three contentious administrative remedies, on 10 December 1994, 11 February 1995 and 4 March 1995 respectively. They had been combined and ruled on together by the Supreme Court on 27 October 1999. The ruling was communicated to him on 29 November 1999, several months after his communication had been submitted to the Committee and five years after the decision of the CGPJ. This delay was entirely unjustified, since the issue was one which concerned a single application to the Supreme Court itself. Those remedies were also unsuccessful. The ruling claimed that the CGPJ possessed discretionary powers for ruling on the extension of the author and that the term "renewable" in article 23 of the Law on Classification and Functions of Employees of the Judiciary referred precisely to the possibility that such an extension was not necessary, but that it could be awarded or not depending on discretionary criteria of timeliness, convenience and usefulness. Regarding the allegation of lack of grounds, the ruling claimed that it was unfounded since there was in existence a report stating that the author and other counsellors had experienced problems in integrating and that this report could be considered one of the grounds for the ruling being contested.

5.3 The author maintains that, during the processing of the remedies, a series of procedural irregularities occurred, violating his right to a public hearing with due guarantees by a competent, independent and impartial tribunal. He states that, by decision of 16 July 1996, the Chamber for Contentious Administrative Affairs decided to combine the three cases and to appoint a reporting judge. On 29 January 1997, more than two years after they had been lodged and without any proceedings being instituted, the case was assigned to the Seventh Section of the same Chamber. Only on 7 April 1997 had a new reporting judge been appointed.

5.4 On 16 June 1997, the hearing of evidence began. The author claimed, among other issues, that five counsellors - including the wife of a magistrate who was coordinator of the counsellors assigned to that Chamber - had been selected and assigned to it. That counsellor and her husband displayed open hostility towards the other counsellors and, of the five, she alone had been extended. The author provides detailed information on an incident that substantiates the existence of that hostility and has supplied copies of the records of witness statements corroborating the existence of that hostility.

5.5 On 6 September 1999, a new reporting judge was appointed on the retirement of the previous one. The author also contends that during the processing of the case the aforementioned coordinator of counsellors had been promoted to Judge of the Supreme Court and assigned, in the run-up to the end of the probationary period, to the same section of the Chamber for Contentious Administrative Affairs that was to rule on the appeal. The author challenged the appointment before the Chamber and lodged a complaint with the CGPJ and the Administration Division of the Supreme Court. The Administration Division informed the author that it would not process his challenge because the vote on remedy had already taken place and the judge in question had abstained. The CGPJ dismissed the complaint on the ground, among others, that the magistrate in question had not been involved in the processing of the contentious administrative remedy.

5.6 The author states that abstention is subject to a process regulated by articles 221 et seq. of the Organic Act on the Judiciary, which requires it to be communicated to the parties, which did not occur in this case, since the only communication was made a posteriori, after the decision had been voted on and when the judge in question was challenged.

5.7 The author states that the ruling of 27 October 1999, which dismissed his contentious administrative appeal, makes no reference to the evidence submitted on his initiative. Instead, it cites a performance report from the Chief Magistrate of the Technical Office, who had expressed a favourable opinion on the quality of his services. That report, dated 15 September 1994, after praising the training of all the non-renewed counsellors, continues as follows: "Nevertheless, they have all had problems in integrating into the work of the Technical Office, whose main purpose is to collaborate with the various Chambers of the Supreme Court in the preparation and elaboration of draft decisions; these adaptation difficulties have had an effect, without prejudice to their professional skill, on their productivity and output." This report was issued long after the proposal of the Administration Division of the Supreme Court of 21 July 1994 not to award the extension. The author claims that it is obvious that the aim was to produce an a posteriori justification of an unfounded decision. He also points to a contradiction between this report and the report in which his performance was praised by the Chief Magistrate.

Additional observations of the State party on admissibility and comments of the author

6.1 On 31 May 2005 the State party stated that the author had submitted his communication to the Committee before exhausting all domestic remedies, since the contentious administrative remedies were still pending. Furthermore, the ruling on them had not been admitted as the subject of *amparo* before the Constitutional Court because the author had not fulfilled the requirement laid down in article 5, paragraph 2 (b), of the Protocol.

6.2 The State party also claims inadmissibility, under article 5, paragraph 2 (a), of the Protocol, on the ground that the author submitted the same case to the European Commission of Human Rights, which had duly apprised him of the reasons it could not succeed. In addition, the State party reiterates inadmissibility under article 2 of the Protocol.

7.1 On 12 August 2005 the author stated, regarding the first observation of the State party, that when he had submitted his communication to the Committee he had already filed the administrative contentious remedies (1994 and 1995), but that the Supreme Court had taken nearly five years to settle them. Moreover, the ruling of 27 October 1999 dismissing them had been the subject of *amparo* before the Constitutional Court. That *amparo* was declared inadmissible on 3 May 2000.

7.2 Regarding the observations of the State party on article 5, paragraph 2 (a), of the Protocol, the author maintains that his application was neither registered nor processed by the European Commission of Human Rights, since, in view of the letter of 24 March 1997 from the secretariat, he had decided not to pursue it. The grounds for inadmissibility adduced by the State party were therefore not applicable.

Observations of the State party on the merits and comments of the author

8.1 In its note verbale of 31 May 2005 the State party states that there had been no violation of article 14, paragraph 1, of the Covenant. The author had been the subject of numerous well-founded and perfectly consistent decisions; hence, the alleged violation of this provision would appear to be founded solely on the author's extremely partial and self-interested assertions.

8.2 Regarding the alleged violation of articles 25 (c) and 26 of the Covenant, the State party refers to the decision of the Constitutional Court whereby it dismissed the author's *amparo* application. The Court claims that the author's employment relationship was temporary and extinguishable by mere effluxion, and that the author had no subjective right to be awarded an extension. The decision-making body enjoys all discretion to award an extension or not.

8.3 The State party further claims that the Supreme Court ruling of 27 October 1999 also refers to the discretionary powers of the decision-making body, which does not consist of a single person but is collegiate. The dossier contained reports that the counsellors whose contracts were not renewed had experienced integration problems, which had affected their productivity and output. These reports could be considered part and parcel of the grounds for the impugned decision. It may be argued that, thanks to its composition, no one is in a better position than the Administration Division of the Supreme Court to judge the ability and suitability of the counsellors. It must also be understood that the judges made oral reports - not explicitly noted down - in order to reach the decision. Where discretionary powers are concerned, it is possible that some of the counsellors with temporary appointments should be granted extensions and others not without any breach of the principle of equality. This principle does not impose equal treatment of unequal assumptions.

8.4 The objectivity of the decision not to extend the author's contract is assured by the evaluation of a collegiate body whose members are directly acquainted with the persons in question, by the other legal guarantees established for selection and dismissal, and by the file on the counsellors in question containing the report of the Chief of the Technical Office.

8.5 The author provides no evidence of unfounded discrimination based on race, gender, religion, social background, and so forth.

9.1 In his reply of 12 August 2005, the author maintains that the Constitutional Court's decision of 28 October 1996 dismissing the first remedy of *amparo* was practically identical to the decision previously handed down on the *amparo* filed by another of the counsellors whose contracts had not been renewed. The Tribunal did not take into consideration the specific characteristic of the case, in which he was the only counsellor who had received a highly laudatory performance report.

9.2 The author also maintains that a judge of the Constitutional Court, who had previously been a member of the CGPJ, had been involved in the *amparo* proceedings of the other counsellor and, in a record vote, had been firmly opposed to the extension. The counsellor in question challenged the judge, who, owing to his earlier involvement in the case, should have abstained completely from the outset. The Court reacted by issuing a simple notice stating that a computer error had occurred when the Court's ruling was being drafted and that the judge in question had in fact abstained and had taken no part in the proceedings. The author criticizes the procedure adopted by the Constitutional Court to rule on the challenge and contends that the abstention had not been in conformity with the provisions of the Organic Law on the Judiciary. The author claims that this incident provides proof of the lack of impartiality with which the Constitutional Court had acted in relation to his own case.

9.3 The author also states that a judge from the Supreme Court, who had been assigned to the Division to settle its contentious administrative remedies, had been involved in the Constitutional Court's decision of 3 May 2000. However, the judge did not abstain from participating in the ruling on the *amparo* application.

9.4 The author reiterates the arguments submitted previously on the lack of grounds for the decision not to renew his contract and the lack of impartiality with which the Supreme Court and the Constitutional Court proceeded, which would constitute a violation of article 14, paragraph 1, of the Covenant.

9.5 Regarding the violation of articles 25 (c) and 26, the author persists in his claim that discretionary powers to decide on an extension must be justified, pursuant to article 54 of the Law on the Legal System governing Public Administrations and the Common Administrative Process.

Issues and proceedings before the Committee

10.1 Before considering any claim contained in a communication, the Human Rights Committee must, in accordance with rule 93 of its rules of procedure, decide whether or not the communication is admissible under the Optional Protocol to the Covenant.

10.2 The Committee takes note of the argument adduced by the State party to the effect that the communication must be considered inadmissible under article 5, paragraph 2 (a), since the author, before appealing to the Committee, had filed an application with the European Commission of Human Rights. However, after considering the information supplied by the author, it concludes that the application had never been registered or examined in any way by the Commission. Consequently, the Committee has ascertained that the matter was not examined under another procedure of international investigation or settlement.

10.3 The Committee also takes notes of the arguments adduced by the State party regarding the failure to exhaust domestic remedies. However, in view of the information supplied by the author, the Committee observes that the remedies that the State party claims not to have been exhausted were actually invoked, there being judicial decisions on the subject. The Committee therefore concludes that the author fulfilled the requirement of article 5, paragraph 2 (b), of the Optional Protocol.

10.4 The issue raised before the Committee is whether the decision of the General Council of the Judiciary not to extend the author in his post of counsellor of the Supreme Court violates articles 25 (c) and 26 of the Covenant. The Committee considers that the right to have access, on general terms of equality, to public service is closely linked to the prohibition of discrimination on the grounds set forth in article 2, paragraph 1, of the Covenant. In the present case, the author has not demonstrated, for the purposes of admissibility, that the reasons for which it was decided not to extend his contract are related to the grounds set forth in article 2, paragraph 1. Nor has the author adduced arguments demonstrating his claim to be entitled to extension of his contract or the existence of national legislation making such extension obligatory, which would have resulted in a violation of article 26 of the Covenant. Consequently, the Committee considers that this part of the communication has not been sufficiently substantiated and is inadmissible pursuant to article 2 of the Optional Protocol.

10.5 With regard to the author's allegation of violation of article 14, paragraph 1, of the Covenant, the Committee observes that it refers to his attempts to challenge the decision of the General Council of the Judiciary not to grant the extension of his contract to which he aspired. The Committee notes that the various rulings of the courts are consistent in that they dismissed a claim founded not on the author's claim to the right to have his contract renewed, but merely on an expectation, and that the extension was, therefore, discretionary on the part of the authorities. Consequently, the Committee considers that the author has not sufficiently substantiated his claim for the purposes of admissibility and considers this part of the communication inadmissible under article 2 of the Optional Protocol.

11. The Committee therefore decides:

(a) That the communication is inadmissible under article 2 of the Optional Protocol;

(b) That this decision shall be communicated to the author of the communication and the State party.

[Adopted in English, French and Spanish, the Spanish version being the original version. Subsequently to be issued also in Arabic, Chinese and Russian, as part of the Committee's annual report to the General Assembly.]

Notes

[1] The author attached a copy of Law 38/1988 on Classification and Functions of Employees of the Judiciary, article 23, paragraph 5, of which establishes the following regarding the Technical Information and Documentation Office of the Supreme Court: "Counsellors of the Supreme Court shall be appointed for a term of three years, renewable for a further three, by the General Council of the Judicature."

[2] In this connection, the author cites article 54, paragraph 1 (f), of the Law on the Legal System and General Administrative Procedure, which provides that grounds for administrative acts "performed in the exercise of discretionary powers, in the same way as those that are required to be declared by legal provision or explicit regulations, must be stated, with a brief statement of the facts and the legal basis for the acts".

J. Communication No. 1094/2002, *Herrera v. Spain* (Decision adopted on 27 March 2006, eighty-sixth session)*

Submitted by:	Jesús Herrera Sousa (represented by counsel)
Alleged victim:	The author
State party:	Spain
Date of communication:	15 November 2000 (initial submission)
Subject matter:	Conviction of the author on insufficient evidence
Procedural issues:	Failure to substantiate claims
Substantive issues:	Failure of the court of second instance to reconsider the facts
Articles of the Covenant:	14, paragraph 5
Articles of the Optional Protocol:	2

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 27 March 2006,

Adopts the following:

Decision on admissibility

1. The author of the communication, which is dated 15 November 2000, is Jesús Herrera Sousa, a Spanish national, who alleges violation by Spain of articles 14, paragraph 5, and 26 of the Covenant. The author is represented by counsel, José Luis Fernández Pedreira.

Factual background

2.1 The author was convicted by the Burgos Provincial Court of the offences of coercion and sexual assault and sentenced on 27 July 1998 to terms of imprisonment of one and three years respectively. The author states that the sole evidence adduced for the prosecution consisted in the patently contradictory statements of the victim. For example, she first submitted a complaint against a fair-haired individual, whereas in later identification procedures (photographs and parade) she picked out the author, who is dark-haired. Furthermore, she affirmed that she recognized the author "without any doubt", although in the oral proceedings she stated that the offences had taken place at night and that she had not seen the assailant's face. The victim first claimed that the offences consisted in an attempted robbery at knifepoint and a search of her body to look for money, but during oral proceedings she stated that the accused had not intended to search her, but to touch her. Further contradictions concerned the assailant's footwear and the weapon used. The author holds that the above-mentioned contradictions acquire special meaning when it is borne in mind that the later statements, contradicting the first one, were made after the victim had been advised by her uncle, a police officer assigned to the same police station as that conducting the inquiries.

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* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Nisuke Ando, Mr. Prafullachandra Natwarlal Bhagwati, Ms. Christine Chanet, Mr. Maurice Glèlè Ahanhanzo, Mr. Edwin Johnson, Mr. Walter Kälin, Mr. Ahmed Tawfik Khalil, Mr. Rajsoomer Lallah, Mr. Michael O'Flaherty, Ms. Elisabeth Palm, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Ivan Shearer, Mr. Hipólito Solari-Yrigoyen and Mr. Roman Wieruszewski.

2.2 The application for a judicial review, which the author had lodged with the Supreme Court, was rejected on 31 March 2000. The author asserts that the Court refused to allow a re-evaluation of the evidence and refused to review the assessment of evidence carried out by the trial court, on the grounds that any such assessment was the exclusive prerogative of that court. The author filed an application for *amparo* with the Constitutional Court. The application was rejected on 18 September 2000. The ruling points out in particular that, "This Court has repeatedly stated that it cannot become a court of third instance invading the jurisdiction of the general courts, which is what would certainly happen if it were to embark upon the review of an element which has nothing to do with the right to the presumption of innocence, the latter being a subjective dimension of the assessment of evidence, that is to say, those aspects of the actual hearing conducted by the original court, which depend on the latter's direct perception of the bringing of evidence."

2.3 The author states that this matter had not been submitted to any other procedure of international investigation or settlement.

The complaint

3. The author alleges that the higher courts refused to reconsider the assembled evidence, which was based solely on the patently contradictory statements of the complainant. This constitutes a violation of article 14, paragraph 5, of the Covenant, since it prevented a full review of the conviction and sentence. The author likewise alleges a violation of article 26 of the Covenant, but does not advance any arguments in support thereof.

State party's submissions on admissibility and merits and author's comments

4.1 In its submissions of 10 September 2002, the State party holds that the communication is inadmissible. It refers to the fact that, in the domestic applications for a judicial review by the Supreme Court and the Constitutional Court, the author did not formulate a complaint in relation to articles 14, paragraph 5, and 26 of the Covenant, so violating the principle of the Committee's subsidiarity established in article 5, paragraph 2 (b), of the Optional Protocol.

4.2 The State party maintains that article 14, paragraph 5, does not establish a right to a complete retrial by a court of second instance, but to the review by a higher court of the trial conducted by the court of first instance, entailing the re-examination of the correct application of the rules which resulted in the findings as to guilt and the imposition of the sentence in a specific case. In this connection, the State party underlines the disparity between the Human Rights Committee and the European Court of Human Rights with regard to the protection of the right to two stages of jurisdiction embodied in identical wording in the Covenant and the European Convention on Human Rights.

4.3 In his application for a judicial review to the Supreme Court, the author did not allege that there was any contradiction in the evidence but confined himself mainly to:

(a) Trying to replace the assessment of evidence by the sentencing court with his own evaluation. The Supreme Court cannot allow that and, after reconsidering all the evidence, stated: "The sentencing court had at its disposal direct evidence for the prosecution, which had been legally assembled and rationally assessed and which was corroborated by much circumstantial evidence supporting the testimony immediately received by the sentencing court";

(b) Denying lewd intention and sexual intent. To this, the Supreme Court replied: "There can be no doubting the rational nature of the inference drawn by the sentencing court, since the absolute objectivity of the established facts clearly points to the unequivocal sexual intent, to which the victim expressly refers";

(c) Discussing the existence of an independent "sense of compulsion". In this respect, the Supreme Court transcribes part of the sentencing court's decision and states: "As the sentencing court rightly establishes, it is possible to distinguish between two separate acts of the accused, which were also prompted by different motives: first a desire for profit and then lubricity. The initial act, which was completed, although the insignificant amount of cash obtained was subsequently abandoned, is characterized by the sentencing court as abandoned robbery with intimidation. But (…) exemption from criminal responsibility for a person who desists from the execution of an act which has already been initiated does not affect the responsibility that person could incur for the acts performed if they were to constitute a separate offence and, in the instant case, the threat of violence at knifepoint intended to force the victim to move from one place to another against her will constitutes a crime against her freedom and security of sufficient magnitude for it to be classed as a punishable offence (…). Nor can it be held that punishment for sexual assault can encompass that for an assault on freedom and security carried out with a different purpose."

4.4 Before the Constitutional Court, the author pleaded the presumption of innocence on the grounds of lack of evidence. In this respect, the Court stated, inter alia, that, in its function of safeguarding the right to the presumption of innocence, it had to give its opinion as to the existence of sufficient evidence for the prosecution and the rational appraisal of that evidence. That was not, however, the aim of the appellant inasmuch as he considered that his conviction as an offender guilty of coercion and sexual assault, in the instant case with the aggravating circumstance of recidivism, violated his right to the presumption of innocence owing to the lack of proof which would make it possible to establish his participation in the offences for which he had been sentenced. "In particular, he maintains in this connection, that the victim's statement is patently contradictory and that there is insufficient evidence to corroborate such statements. In consequence whereof, this Court cannot but conclude that, under the guise of the presumption of innocence, the applicant is, in reality, seeking to substitute the criterion employed by the earlier courts with his own. Indeed, as the decisions appealed against amply establish, in the instant case there was valid evidence for the prosecution, it being constituted, above all, by the victim's statements. This evidence was subjected to due adversary procedure during the trial.

It was sufficient and it was considered in a perfectly reasonable manner by the sentencing courts which, after due scrutiny, did not find any reason to call into question the credibility of the assaulted woman's consistent and unchanging account when finding that the accused was guilty of the coercion and sexual assault she had suffered. In the opinion of the ordinary courts, these statements were corroborated by the following circumstantial evidence: (a) the clothing worn by the assailant was identical to that worn by the accused at the time of his arrest; (b) the offences were committed with a small knife and the police officers found a small knife in the accused's car, when he was arrested; (c) the accused lives near the site of the offences and ran away in that direction after committing them. Since the existence of an assessment of the evidence in accordance with a rational criterion has been confirmed, it should be remembered that this Court has repeatedly said that it cannot become a court of third instance invading the jurisdiction of the general courts, which is what would certainly happen if it were to embark upon the review of an element which has nothing to do with the right to the presumption of innocence, the latter being a subjective dimension of the assessment of evidence, that is to say, those aspects of the actual hearing conducted by the original court, which depend on the latter's direct perception of the bringing of evidence."

4.5 Before the Committee, the author is alleging the violation of articles 26 and 14, paragraph 5, of the Covenant on the grounds that, in his view, the victim's statements were contradictory. During the domestic applications for a judicial review, the Constitutional Court, having examined that allegation thoroughly and fully, rejected it, stating the detailed reasons therefor, as outlined in the preceding paragraph.

4.6 The State party concludes that the author's communication contains nothing to support an alleged violation of the Covenant and that the communication should be declared inadmissible under article 3 of the Optional Protocol. In a letter dated 23 January 2003, the State party declared, with regard to the merits, that, for the above-mentioned reasons, it considered that there had been no violation of the Covenant in the instant case.

5.1 The author responded to the submissions of the State party on 31 March 2003. In respect of the argument that he did not claim the right to a second hearing before the domestic courts, he replied that he did so by applying for a re-examination of the facts.

5.2 The author repeats that the accusations forming the basis of his conviction were initially directed against a fair-haired person, wearing white shoes and carrying a small knife with a pale-coloured handle with which he intimidated a woman to rob her of money. The author is, however, dark-haired and at the time of his arrest, he was wearing black shoes and carrying a large knife with a dark-coloured handle which he was accused of having used to sexually abuse the victim, whose statement constituted the sole evidence for the prosecution. Despite these patent contradictions, the higher courts expressly refused even to examine the facts said to have been proven by the court of first instance, because that is how the Spanish judicial system operates; it is impermissible to reconsider the facts during a judicial review. A judicial review is not a court of second instance; it is an extraordinary remedy on specific grounds from which the reconsideration of the facts is expressly excluded.

Issues and proceedings before the Committee

6.1 Before considering any claim contained in a communication, the Human Rights Committee must, in accordance with rule 93 of its rules of procedure, decide whether or not the communication is admissible under the Optional Protocol to the Covenant.

6.2 The author alleges the violation of article 14, paragraph 5, of the Covenant on account of the fact that the offences of which he was convicted by the court of first instance were not reconsidered by a higher court, since a judicial review in the Spanish legal system is not an appeal procedure but is admissible solely for specific reasons which expressly exclude the re-examination of the facts.

6.3 From the decisions of the Supreme Court and the Constitutional Court, it emerges that they thoroughly examined the assessment of evidence carried out by the court of first instance and concluded that the victim's statements had been subjected to an adversary procedure during the trial in a manner judged to be reasonable by the trial court and that the inconsistencies mentioned by the author had been borne out by other circumstantial evidence. In the Committee's opinion, the claim regarding article 14, paragraph 5, is insufficiently substantiated for the purposes of admissibility and it concludes that it is inadmissible under article 2 of the Optional Protocol. The author has not set forth the reasons why he considers that article 26 has been violated; for this reason, this part of the communication must also be deemed inadmissible on the grounds that it does not fulfil the requirements of article 2 of the Optional Protocol.

7. The Human Rights Committee therefore decides:

(a) That the communication is inadmissible under article 2 of the Optional Protocol;

(b) That the decision be transmitted to the State party and to the author.

[Adopted in English, French and Spanish, the Spanish text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the Committee's annual report to the General Assembly.]

K. Communication No. 1102/2002, *Semey v. Spain*

(Decision adopted on 27 March 2006, eighty-sixth session)*

Submitted by:	Semey Joe Johnson (not represented by counsel)
Alleged victim:	The author
State party:	Spain
Date of communication:	15 August 2001 (initial submission)
Subject matter:	Establishment of guilt of involuntary manslaughter by trial, right to a second hearing
Procedural issues:	Insufficient substantiation of the alleged violations
Substantive issues:	Right to due process, right to a second hearing, equality before the law
Articles of the Covenant:	14 and 26
Article of the Optional Protocol:	2

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 27 March 2006,

Adopts the following:

Decision on admissibility

1.1 The author of this communication of 15 August 2001 is Semey Joe Johnson,[1] a Canadian and Cameroonian citizen born in 1969, currently being held at the Torrendondo Penitentiary Centre in Madrid. The author claims to be a victim of violations by Spain of article 14, paragraphs 1, 2, 3 (e), and 5, and article 26 of the International Covenant on Civil and Political Rights. He is not represented by counsel.

1.2 The Optional Protocol entered into force for Spain on 25 April 1985.

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* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Nisuke Ando, Mr. Prafullachandra Natwarlal Bhagwati, Ms. Christine Chanet, Mr. Maurice Glèlè Ahanhanzo, Mr. Edwin Johnson, Mr. Walter Kälin, Mr. Ahmed Tawfik Khalil, Mr. Rajsoomer Lallah, Mr. Michael O'Flaherty, Ms. Elisabeth Palm, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Ivan Shearer, Mr. Hipólito Solari-Yrigoyen and Mr. Roman Wieruszewski.

Factual background

2.1 The author was tried for allegedly causing a traffic accident that took place on 21 February 1998, which resulted in one person's death. The driver of the vehicle that caused the accident had a false number plate and a false driving licence with the author's personal details. The driving licence was withheld by the police and the driver was allowed to recover his vehicle. During the trial, the author constantly denied any connection with the aforementioned events, alleging that his driving licence had been mislaid, and that someone had used his personal details to falsify the driving licence now in the court's possession.

2.2 On 19 June 2000, the Madrid Criminal Court No. 27 sentenced the author to three and one-half years' imprisonment for involuntary manslaughter, with a specific disqualification from the right to be elected during the time of his sentence and loss of driving licence for four years, and for two offences of falsification, with two years' imprisonment for each offence, with specific disqualification from the exercise of the right to be elected during the time of his sentence, and a 12-month fine to be paid in daily quotas of 200 pesetas (€1.20), subject to deprivation of liberty of one day for every two unpaid quotas.

2.3 The author lodged an appeal with the Madrid Provincial High Court alleging a violation of the right to presumption of innocence, an error in assessing the evidence - which allegedly contradicted the report based on the identity parade - and the absence of grounds for the sentence passed. On 5 October 2000, the Provincial High Court dismissed the appeal and upheld the sentence of the Criminal Court, on the grounds that both the evidence of the witnesses and the handwriting expert's report produced in the lower court were valid and sufficient to prove that the author was guilty of the offence with which he had been charged.

2.4 The author applied for special review by the Supreme Court, alleging new evidence in his favour, which he had obtained through a private investigation service he had hired subsequently to the judgements of the courts of first and second instance. The evidence consisted in a witness who could supposedly declare that at the approximate time of the accident the author was expected to take part in a radio programme. On 17 May 2001, the Supreme Court dismissed the application for judicial review considering that the proposed evidence did not reveal new facts or evidence that proved the author's innocence, and moreover referred to probative material that could have been available before the trial had taken place and the appeal had been lodged.

2.5 The author filed an application for *amparo* with the Constitutional Court, alleging a violation of the right to effective judicial remedy and due process. On 4 June 2001, the Constitutional Court dismissed the application, after considering that the sentences challenged contained sufficient grounds for the inadmissibility of the author's complaints and sufficient evidence against him on which to base the sentence.

The complaint

3.1 The author alleges that there was a violation of article 14, paragraph 1, arguing that the sentence was arbitrary since it was based merely on the identification procedure conducted during the oral proceedings, which contradicted the report based on the identity parade.

3.2 The author contends that the sentence was based merely on circumstantial evidence, and that there was not sufficient evidence against him to invalidate the presumption of innocence. The right to presumption of innocence enshrined in article 14, paragraph 2, was therefore allegedly violated.

3.3 He further alleges that the Supreme Court did not allow the witness proposed by him to appear during the application for review, which violated article 14, paragraph 3 (e).

3.4 The author adds that there was a violation of article 14, paragraph 5, since the Provincial High Court did not reassess the circumstantial evidence on the basis of which he had been sentenced by the court of first instance.

3.5 Lastly, the author considers that there is a violation of the right to equality before the law under article 26, since he was not offered due process, and the taking of evidence during the oral proceedings was not in keeping with the principles of a fair hearing and adversarial procedure.

State party's observations and author's comments

4.1 In its observations of 10 September 2002, the State party contests the admissibility and merits of the communication, noting that both the Provincial High Court and the Constitutional Court had examined the author's allegations and had dismissed them, stating their reasons and motives. The State party adds that the author cannot seek to replace the logical and reasoned assessment of evidence arrived at by the judicial bodies by his own assessment.

4.2 The State party also observes that the Supreme Court gave clear reasons for dismissing the application for special review, noting that the appellant did not reveal new facts or evidence which would prove his innocence and which moreover he could have obtained before the trial was held.

5. On 25 March 2003, the author contested the State party's arguments, reiterating his initial allegations. He points out that his criminal record is not sufficient grounds for justifying the inadmissibility of his communication or as evidence of his responsibility for the offences with which he was charged in the case at hand.

Issues and proceedings before the Committee

6.1 Before considering any claim contained in a communication, the Human Rights Committee must, in accordance with rule 93 of its rules of procedure, decide whether or not the communication is admissible under the Optional Protocol to the Covenant.

6.2 In accordance with article 5, paragraph 2 (a), the Committee has ascertained that the matter is not being examined under another procedure of international investigation or settlement.

6.3 The Committee has also ascertained that the author has exhausted all domestic remedies, pursuant to article 5, paragraph 2 (b), of the Optional Protocol.

6.4 With regard to the alleged violation of article 14, paragraphs 1 and 2, the Committee recalls its jurisprudence to the effect that it is for the courts of States parties to assess the facts and evidence, unless the assessment is manifestly arbitrary or constitutes a denial of justice.[2]

The Committee considers that the author has failed to substantiate, for purposes of admissibility, that the conduct of the courts of the State party amounted to arbitrariness or a denial of justice and therefore declares both claims inadmissible under article 2 of the Optional Protocol.

6.5 With regard to the author's allegation of a violation of article 14, paragraph 3 (e), on the grounds that the expert opinion presented at the review stage was rejected, the Committee recalls that the right referred to in the above provision is not absolute, in the sense that it does not allow for the submission of evidence at any time or in any manner, but is intended to guarantee "equality of arms" between the parties during the trial. The Committee takes note of the Supreme Court's argument that the author did not avail himself of the right to submit the evidence in question in the courts of first and second instance, although the evidence could have been obtained before the trial was held in the Criminal Court. Consequently, the Committee considers that this part of the communication is insufficiently substantiated for the purposes of admissibility and concludes that it is inadmissible under article 2 of the Optional Protocol.

6.6 With regard to the alleged violation of article 14, paragraph 5, the Committee considers that from the judgement of the Madrid Provincial High Court it is clear that that body carefully examined the Criminal Court's assessment of the evidence. In this respect, the Provincial High Court considered that the evidence submitted against the author was sufficient to counter the presumption of his innocence. Consequently, this part of the communication is insufficiently substantiated for the purposes of admissibility, and the Committee concludes that it is inadmissible under article 2 of the Optional Protocol.[3]

6.7 With regard to the violation of article 26 alleged by the author, in the sense that he did not enjoy equal treatment before the law, the Committee considers that the author has not shown any allegedly discriminatory treatment on the part of the domestic courts with respect to the aforementioned article. Consequently, the Committee considers that the allegations in question are insufficiently substantiated for the purposes of admissibility and that the part of the communication in question is inadmissible under article 2 of the Optional Protocol.

7. The Human Rights Committee therefore decides:

(a) That the communication is inadmissible under article 2 of the Optional Protocol; and

(b) That this decision shall be communicated to the author of the communication and the State party.

[Adopted in English, French and Spanish, the Spanish text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian, as part of the Committee's annual report to the General Assembly.]

Notes

[1] Also known by the name "Joseph Semey", by which he identifies himself in communication No. 986/2001, submitted on an earlier occasion to the Committee with regard to his sentence for another crime.

[2] Cf., inter alia, communications Nos. 811/1998, *Mula v. Republic of Guyana*, 867/1999, *Smartt v. Republic of Guyana*, 917/2000, *Arutyunyan v. Uzbekistan*, 927/2000, *Svetik v. Belarus*, 1006/2001, *Martínez Muñoz v. Spain*, 1084/2002, *Bochaton v. France*, 1138/2002, *Arenz v. Germany*, 1167/2003, *Ramil Rayos v. The Philippines* and 1399/2005, *Cuartero Casado v. Spain*.

[3] Cf. communications Nos. 1399/2005, *Cuartero Casado v. Spain*, para. 4.4, and 1059/2002, *Carvallo Villar v. Spain*, para. 9.5.

L. Communication No. 1103/2002, *Castro v. Colombia* (Decision adopted on 28 October 2005, eighty-fifth session)*

***Submitted by*:**	Jaime Castro Ortíz (represented by counsel, Germán Humberto Ricón Perfetti)
***Alleged victim*:**	The author
***State party*:**	Colombia
***Date of communication*:**	13 December 1998 (initial submission)
***Subject matter*:**	Dismissal of an HIV-infected worker from his place of employment
***Procedural issues*:**	Failure to exhaust domestic remedies
***Substantive issues*:**	Right not to be subject to discrimination, right to equality, right to privacy and right to an impartial tribunal
***Articles of the Covenant*:**	2, 3, 5, 14, paragraph 1, 17 and 26
***Articles of the Optional Protocol*:**	2 and 5, paragraph 2 (b)

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 28 October 2005,

Adopts the following:

Decision on admissibility

1. The author of the communication dated 13 December 1998 is Jaime Castro Ortíz, a Colombian citizen born in 1961, who alleges that he is a victim of violations by Colombia of articles 2, 3, 5, 14, paragraph 1, 17 and 26 of the Covenant. The Optional Protocol entered into force for the State party on 23 March 1976. The author is represented by counsel, Germán Humberto Rincón Perfetti.

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* The following members of the Committee participated in the examination of the present communication: Mr. Nisuke Ando, Mr. Prafullachandra Natwarlal Bhagwati, Mr. Alfredo Castillero Hoyos, Ms. Christine Chanet, Mr. Maurice Glèlè Ahanhanzo, Mr. Edwin Johnson, Mr. Walter Kälin, Mr. Ahmed Tawfik Khalil, Mr. Rajsoomer Lallah, Mr. Michael O'Flaherty, Ms. Elisabeth Palm, Sir Nigel Rodley, Mr. Ivan Shearer, Mr. Hipólito Solari-Yrigoyen, Ms. Ruth Wedgwood and Mr. Roman Wieruszewski.

Pursuant to rule No. 90 of the Committee's rules of procedure, Committee member Mr. Rafael Rivas Posada did not participate in the adoption of the present decision.

The facts as submitted by the author

2.1 On 1 December 1989 the author began working in the information systems division of Banco del Comercio, now Banco de Bogotá. On 24 July 1991 he was diagnosed as carrying the human immunodeficiency virus (HIV), and accordingly as from that date attended the HIV/AIDS Programme of the Social Security Institute (ISS).

2.2 On 11 November 1997 the author's attending physician, Dr. Luis Paulino Pineda, who was attached to ISS, wrote out a series of written recommendations for the author aimed at ensuring that his treatment was successful; these included maintaining a regular schedule of rest, meals and medication. The author maintains that at that time his working hours were irregular and unpredictable, as he might be assigned to a day shift or a night shift without knowing which shift he would have the next month.

2.3 On 25 November 1997 the author met with Ms. María del Carmen Centena, the administrator in the production area of Banco de Comercio, to whom he gave the list of recommendations prepared by the ISS physician. Ms. Centena said that the list was intended only for the author and that he should obtain a letter from the ISS Department of Occupational Health addressed to Banco de Bogotá.

2.4 On 20 March 1998 the ISS Department of Occupational Health addressed a letter to the bank in which it noted that "[the author's] illness could be aggravated by his current working conditions" and made a series of recommendations. On the basis of this letter, the author wrote to Banco de Bogotá on 8 April 1998 requesting that he should be given a permanent shift assignment, preferably to a day shift. On 14 April 1998 Mr. Gonzalo Urbina Jiménez, head of personnel of Banco de Bogotá, replied to the author in writing that the entity responsible for determining the measures to be taken in his case was the insurance company Aseguradora de Riesgos Profesionales Seguros de Vida Alfa S.A., which was affiliated with the bank, and not ISS. In the same letter the author was informed that he had an appointment with the insurance company's physicians on 20 April 1998.

2.5 The author alleges that before he went to the appointment, María del Carmen Centena, the administrator in the production area, told him that Banco de Bogotá was unable to reassign him and tried to convince him to resign, to which end she was prepared to negotiate a settlement. The author replied that he could not accept her offer because he was young and wished to continue working at the bank.

2.6 The author attended his medical appointment with the insurance company physician, whom he told that he was HIV-positive, adding that he did not want the bank to know. The doctor said that he agreed with the recommendations of ISS but that he would have to reveal the author's diagnosis to the bank so that his shift could be changed.

2.7 In a letter dated 25 April 1998 the head of the production management department of Banco de Bogotá informed the author that the bank had unilaterally decided to terminate the author's contract of employment "without just cause", in accordance with the provisions of article 6 of Act No. 50 of 1990, with effect from that day.

2.8 The author filed a complaint (*acción de tutela*) with civil circuit court No. 23, claiming compensation and alleging a violation of his right to work, to privacy, to equality and to human dignity. On 14 May 1992 the judge rejected the complaint, ruling that no violation had occurred.

2.9 The author appealed the civil court's decision in the Civil Division of the Superior District Court of Santa Fé de Bogotá, which upheld the decision of the court of first instance on 2 July 1998.

2.10 The author affirms that the matter is not being examined under another procedure of international investigation.

The complaint

3.1 The author alleges that the State party violated article 2 of the Covenant because it did not honour its undertaking to ensure the rights recognized in the Covenant without distinction of any kind. He maintains that the Ministry of Health has stated that HIV is not a priority issue and that the Banking Supervisory Authority did not take steps to prevent discrimination.

3.2 The author alleges a violation of article 3 of the Covenant, arguing that the State party allowed a public entity to dismiss an individual solely because he was HIV-positive.

3.3 The author considers that article 5 of the Covenant was also violated because the State party was aware of the circumstances of the case and yet authorized acts aimed at the destruction of the author's rights.

3.4 The author maintains that the State party violated article 14, paragraph 1, of the Covenant because the judges did not order the entity in question to restore the victim's violated rights and that in a situation very similar to his own the Constitutional Court had granted the remedy of *amparo*, which had not happened in his own case.

3.5 The author alleges a violation of article 17, claiming that the State party allowed confidential information about him to be made public, which resulted in his dismissal from employment.

3.6 The author maintains that the State party violated article 26 because it did not provide equal and effective protection against the discrimination he suffered as a result of his diagnosis.

State party's observations on admissibility and the merits

4.1 In a letter dated 28 January 2005 the State party maintains that the communication must be declared inadmissible under article 5, paragraph 2 (b), of the Optional Protocol because the author has not yet availed himself of the ordinary labour courts, from which he might have obtained a decision in his favour and compensation for the harm he suffered. The State party adds that both the Colombian Government and the Constitutional Court have established numerous mechanisms to protect the human rights of persons with HIV with a view to ensuring that they are not marginalized. It notes further that there have been Constitutional Court decisions that protect the rights of persons with AIDS from any kind of discrimination, but that they are not applicable in the present case. An employee may not be dismissed solely because he or she is HIV-positive. However, a sick person may be dismissed when the grounds have nothing to do with the person's health status, as in the case of the author.

4.2 The State party recalls that the requirement of exhaustion of domestic remedies is based on the notion of the subsidiary nature of international human rights protection, with its implicit acknowledgement that every State must be able to offer a judicial system capable of settling the matters brought before it. It points out that the author still has recourse to the ordinary labour courts and that he must determine that they are not effective in his case. The fact that the decision relating to the author's *acción de tutela* did not have the outcome he sought was due to a series of considerations related to the case having to do with the judge's assessment of the information presented during the proceedings, and not to a denial of access to justice. The State party notes that one must not assume that a judicial mechanism will be ineffective, since its assessment must be made in accordance with the facts and circumstances of each case; thus it is impossible to say that a particular mechanism is always ineffective, as that would mean that recourse to domestic law had become the exception or that it was for individuals to decide who had jurisdiction to hear cases of presumed violations of international norms. According to the State party, the author is attempting to make the Committee a fourth instance.

4.3 The State party further alleges that the present complaint must be found inadmissible under article 2 of the Optional Protocol as it is insufficiently substantiated. It notes that the author was not dismissed because he was HIV-positive, since while he was employed at Banco de Bogotá the bank did not know that he was carrying the virus until it learned of the *acción de tutela* brought by the author. Moreover, while it was true that the author had submitted various medical certificates justifying his inability to work, none of them contained any mention of his diagnosis; in fact, his file was reviewed, and no document of any kind from which his health status might have been inferred was found. The State party maintains that, according to Banco de Bogotá, the author did have different work schedules, but that they all conformed to the law and that he was informed of changes of schedule in advance, so that the author's allegations are untrue.

4.4 The State party says that the body authorized to recommend a job reassignment was the insurance company Aseguradora de Riesgos Profesionales Seguros de Vida Alfa S.A., which was affiliated with Banco de Bogotá, as the author was told. It adds that the report issued by the insurance company merely stated that the author was suffering from an illness of "common origin", without specifying what it was, and that it did not recommend a job reassignment. Moreover, the report was submitted in May 1998, when the author had already left the bank.

4.5 The State party notes that, as the bank itself reported, Banco de Bogotá terminated the author's contract of employment without just cause on 25 April 1998, but it did so on the basis of article 6 of Act No. 50 of 1990 of the Substantive Labour Code in force at the time, and the dismissal occurred without compensation, pursuant to the court's decision in respect of the *acción de tutela*. The State party goes on to say that, as the bank noted, the author's dismissal was occasioned by his conduct at work and the many mistakes he made on the job; this was the bank's objective motive for wanting to get rid of him, a motive very different from discrimination based on his positive HIV status. The State party insists that the author was denied the remedy of *amparo* because the judges considered that that remedy bore no relation to his dismissal or to his positive HIV status. There was no indication that the bank was aware of the author's condition when it terminated his contract of employment, which leads to the conclusion that his dismissal was due to reasons that had absolutely nothing to do with his health status. Accordingly, the State party considers that there has been no violation of articles 2, 3, 5, 14, paragraph 1, 17 or 26 of the Covenant.

Author's comments on the State party's observations

5.1 In a letter dated 15 June 2005 the author states that it is not true that Banco de Bogotá only learned of his health problems when he filed his *acción de tutela*, since on 8 April 1998 he had submitted a request to be assigned to the day shift on account of the fact that for approximately one year now he had been having health problems that required "ongoing medical treatment, and he had attached copies of medical certificates to the letter. In addition, the note from ISS dated 9 March 1998 stated that the author was HIV-positive, and the medical certificates attesting to the author's inability to work that were submitted to the bank, and which the bank acknowledges having received, contained the code for the medical condition in question, as it would have been impossible to justify his inability to work without it.

5.2 The author insists that he requested a change of schedule because Banco de Bogotá did not respect legal work schedules, and that the Constitutional Court had found in its judgement No. 256/96 of 30 May 1996 that no one may have his or her contract of employment terminated without an explanation. In the author's case, the courts accepted the termination of his contract without taking the jurisprudence of the Constitutional Court into account.

5.3 The author maintains that it is not true that the State party had set up programmes to combat discrimination against persons living with HIV and to increase public awareness of misconceptions about HIV and AIDS, since there was not even an office that dealt with HIV-related issues.

5.4 As to the exhaustion of domestic remedies, the author maintains that similar cases in which persons were dismissed from their jobs because they were HIV-positive were dealt with by the constitutional courts through the remedy of *tutela*, a remedy that he himself had tried, thereby exhausting domestic remedies.

Issues and proceedings before the Committee

6.1 Before considering any claim contained in a communication, the Human Rights Committee must, in accordance with rule 93 of its rules of procedure, decide whether the complaint is admissible under the Optional Protocol to the Covenant.

6.2 The Committee has ascertained that the same matter is not being examined under another procedure of international investigation or settlement for the purposes of article 5, paragraph 2 (a), of the Optional Protocol.

6.3 The Committee takes note of the State party's allegations that the communication must be declared inadmissible under article 2 and article 5, paragraph 2 (b), of the Optional Protocol because the author did not exhaust the remedies available to him in the ordinary labour courts and that the complaints have not been sufficiently substantiated. The Committee observes that the author merely states that he has exhausted valid domestic remedies because he filed an *acción de tutela* before the constitutional court. He does not, however, deny that judicial remedies offered in the ordinary labour courts were available to him, nor does he explain why such a remedy would have been ineffective in his case. These doubts about the effectiveness of judicial remedies do not absolve an author from exhausting them. In the light of the foregoing, the Committee finds the communication inadmissible under article 5, paragraph 2 (b), of the Optional Protocol because the author has not exhausted domestic remedies. The Committee therefore regards the consideration of the State party's remaining arguments unnecessary.

7. The Human Rights Committee therefore decides:

(a) That the communication is inadmissible under article 5, paragraph 2 (b), of the Optional Protocol;

(b) That this decision shall be communicated to the State party, to the author of the communication and to his counsel.

[Adopted in English, French and Spanish, the Spanish text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the Committee's annual report to the General Assembly.]

M. Communication No. 1120/2002, *Arboleda v. Colombia* (Decision adopted on 25 July 2006, eighty-seventh session)*

Submitted by:	Marco Antonio Arboleda Saldarriaga (represented by counsel, Luis Manuel Ramos Perdomo)
Alleged victim:	The author
State party:	Colombia
Date of communication:	4 August 2002 (initial submission)
Subject matter:	Complaint regarding identity of the person sought for extradition
Procedural issues:	Failure to substantiate claims
Substantive issues:	Detention in contravention of procedural legislation
Articles of the Covenant:	9 and 14, paragraphs 1, 2 and 3 (a)
Articles of the Optional Protocol:	2; 5, paragraph 2 (b)

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 25 July 2006,

Adopts the following:

Decision on admissibility

1. The author of the communication, dated 4 August 2002, is Marco Antonio Arboleda Saldarriaga, a Colombian national, who claims to be the victim of a violation by Colombia of articles 9 and 14 of the Covenant. He is represented by counsel, Luis Manuel Ramos Perdomo.

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* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Nisuke Ando, Mr. Prafullachandra Natwarlal Bhagwati, Mr. Maurice Glèlè Ahanhanzo, Mr. Edwin Johnson, Mr. Walter Kälin, Mr. Ahmed Tawfik Khalil, Mr. Rajsoomer Lallah, Ms. Elisabeth Palm, Sir Nigel Rodley, Mr. Ivan Shearer and Mr. Hipólito Solari-Yrigoyen.

Pursuant to rule No. 90 of the Committee's rules of procedure, Committee member Mr. Rafael Rivas Posada did not participate in the adoption of the present decision.

Factual background

2.1 In October 1999, the United States applied to the Government of Colombia for the extradition of Luis Carlos Zuluaga Quiceno, a Colombian citizen. It supplied details including the name, identity card No., height, age, place and date of birth, and skin colour of the person whose extradition was applied for. The extradition document also included the person's photograph.

2.2 The author alleges that the police officers and officials of the Colombian Attorney-General's Office (*Fiscalia General*) who took part in the arrest procedure of 13 October 1999 seem to have mistaken the address where the arrest was to be made, and entered his home. The search warrant gives a different address from that of the author's home. It also gives inconsistent physical and biographical data, which the police officers used as an excuse to ask him to come with them voluntarily to the so-called GRUCE (Central Provincial Unit) police station, so that the necessary fingerprinting checks could be run to find out whether he was the person sought.

2.3 After the author's detention, the Attorney-General's Office suggested to the United States Embassy in Colombia that it apply for his extradition, suggesting that the person sought was named Marco Antonio Arboleda Saldarriaga, not Luis Carlos Zuluaga Quice. The Embassy then issued new notes verbales in which only the name of the person sought was changed, leaving unaltered all the other information needed for his positive identification, such as age, height, distinguishing features, and a photograph of the person actually wanted. Moreover, the same notes verbales stated that the Embassy would recommend the judicial authorities to modify the existing indictment. In other words, at that time there was not even a formal charge in the United States against the author, though he had already been unlawfully and arbitrarily deprived of his liberty for several days.

2.4 The author was notified in detention of the arrest warrant for extradition issued against Luis Carlos Zuluaga Quiceno, identity card No. 70.041.763, issued in Cocomá, and he was later notified of an additional explanatory arrest warrant, made out in the name of Marcos Arboleda Saldarriaga, identity card No. 3.347.039, from Medellín, which did not match the author either.

2.5 The author petitioned for his release on the grounds that his arrest was unlawful; his application was turned down by the Attorney-General in a decision dated 12 September 2001.

2.6 Since the age of 10, the author has had part of his right index finger and thumb missing, a feature not displayed by the person sought, who exists, as has been checked in the files of the National Registry, has all his fingers and bears no special distinguishing marks.

2.7 The Public Prosecutor's Office (*Ministerio Público*) handed down an opinion unfavourable to extradition, as the requirement of complete identification was not satisfied, the requisite proof not having been produced. However, the Criminal Chamber of the Supreme Court considered that the applicant country had explained that the correct name of the person sought for extradition was Marco Antonio Arboleda Saldarriaga, and that the indictment by the Florida Southern District Court was aimed at him, though it had given a false name used by that individual. In short, the Supreme Court ruled in favour of extradition.

2.8 The author points out that the entire identity clarification procedure took place after his illegal detention, and that from the outset the applicant State provided a photograph of the person whose extradition it was seeking which did not remotely correspond to his own distinguishing or physical features. He contends that he was not the person whose extradition was being sought and that, starting with the errors that had led to his wrongful detention, a whole web of conspiracy was woven to cover up these irregularities, and the relief he sought was systematically rejected, along with any recognition of his rights and guarantees.

2.9 The author states that there was conclusive proof of his identity. For example, the 10-print record of his fingers in the files of the National Civil Registry in the name of Luis Carlos Zuluaga Quiceno, identity card No. 70.041.763, is not the same as that of Marco Antonio Arboleda Saldarriaga.

2.10 The Government of Colombia upheld the arguments put forward by the Supreme Court and, in decision No. 70 dated 27 May 2002, authorized the extradition of the author, identity card No. 3.347.939. The author lodged an appeal for reconsideration against that decision with the Ministry of Justice on 7 June 2002, but it was unsuccessful.

2.11 The author states that he has exhausted all the remedies available to him under the extradition procedure. In addition, he filed an application for legal protection (constitutional *amparo*), which was rejected on 23 September 2002.

The complaint

3. The author alleges that the facts described are a breach of articles 9 and 14, paragraphs 1, 2 and 3 (a), of the Covenant. He reports in particular that he was arrested without an arrest warrant being issued by a competent authority. Moreover, the note verbale that the arrest was based on did not meet the provisions of the Code of Criminal Procedure, as he was not identified in it either in part or in full. He also states that during the court hearings phase of the extradition proceedings before the Supreme Court, his right to a defence and due process was breached because of a refusal to produce the evidence requested by both the defence and the Public Prosecutor with the aim of fully meeting the procedural requirement to make a full identity check of the person sought.

State party's submissions on admissibility and author's comments

4.1 In its submissions of 27 November 2002, the State party points out that in note verbale No. 1066, dated 7 October 1999, the United States requested the provisional detention of Luis Carlos Zuluaga Quinceno, with a view to his extradition, to answer federal narcotics and related charges in court. Colombia's Attorney-General, in a decision of 11 October 1999, issued an arrest warrant initially in the name of Luis Carlos Zuluaga Quince. Subsequently, in a decision dated 13 October 1999, he amended the arrest warrant since the true identity of the person sought was Marcos Antonio Arboleda Saldarriaga, identity card No. 3347039. On 13 October 1999, the criminal investigation police detained Marco Antonio Arboleda Saldarriaga, identity card No. 337939 from Medellín.

4.2 The author petitioned for immediate release in view of the wrongful nature of the arrest but his application was turned down by the Colombian Attorney-General by decision dated 12 September 2001. In that decision the Attorney-General states that the person whose arrest had been originally requested by the United States was Mr. Marco Antonio Arboleda Saldarriaga, although the decision of 13 October 1999 refers to identity card No. 3347039 from Medellín. He also notes that the Supreme Court, in an order dated 22 May 2001, would not hear the petition to produce evidence requested by the defence counsel, on the grounds that it had not been submitted at the right time and turned down the offer to produce evidence made by the Public Prosecutor on the grounds that the matter of the identity of the person sought was clear.

4.3 In an order dated 30 April 2002, the Court found in favour of the author's extradition. The Court declared that its finding that the author was the person sought for extradition had been clearly demonstrated. It ruled that the petitioning State had not only clarified and sought the extradition of the individual bearing the name of Marco Antonio Arboleda Saldarriaga and his identity card, but also emphasized that it was one and the same individual who was using an alias. Under the laws of the applicant State, a later alternative indictment supersedes any earlier ones. The Court stated: "The valid alternative indictment was issued against the two names in question, Zuluaga Quiceno and Arboleda Saldarriaga, which, it has been specified, apply to one and the same person, and though, in the notes verbales formulating the extradition request, reference was to the latter, and though his identity card No. was 3.347.939, there is no doubt that the extradition of Mr. Arboleda Saldarriaga has been requested in due form, and the identity is that of the detainee, as can be seen from the various documents endorsed by him - the instructions to his defence lawyer, the briefs addressed to the Chamber - and from the copy of the identity card provided."

4.4 The Court also noted that for cases of unlawful detention the law possessed machinery such as habeas corpus and the use of petitions against wrongful arrest, remedies which must be employed when relevant.

4.5 The Government upheld the arguments of the Court and authorized extradition. In the associated decision, it stated the following: "From the foregoing it may be concluded that the wanted citizen's identity has been amply discussed by the body issuing the arrest warrant and in the Supreme Court. (…) If the person sought and his lawyer continue to disagree, contending that nine different identities have been ascribed to him and that the individual sought must be given the benefit of the doubt where doubt exists, then the situation implies an examination of criminal responsibility, and that is not a matter for extradition proceedings but for the trial to be held abroad."

4.6 By executive decision No. 96, dated 1 August 2002, the Government of Colombia ruled on the author's application for reconsideration, confirming the decision in its entirety and thereby exhausting administrative remedies. That decision states:

> "In the ruling challenged, it was considered that the identity of the citizen sought had been thoroughly discussed by the body issuing the arrest warrant and by the Supreme Court, the competent authority for examining compliance with a requirement of this sort. (…)

> "The defence counsel's view when he makes assertions about the legality of the proceeding, expressing the view that there has been a violation of basic rights to due process, to defence and to equality, is not pertinent (…) because this is a matter outside the competence of the Government of Colombia. (…) In the same way, the defence counsel's comparisons with other rulings by the Court regarding complete identity cannot be sustained.
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> "The Government of Colombia does not consider it relevant to discuss the nine identities that the defence counsel argues have been ascribed to his client, for the documents in the file show that the man detained is the individual whose extradition has been formally sought. That an attempt is being made to show that the man detained has no connection to the trial taking place in the United States is another matter; in that case, the question of responsibility must be raised before the courts in the applicant country, as was stated in the administrative ruling under challenge, inasmuch as extradition is not a criminal proceeding in which the responsibility of the person sought can be assessed.
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> "It is also wrong to claim to be ignorant of the opposite opinion submitted by the Public Prosecutor, first because that opinion was stated before the Criminal Chamber of the Supreme Court, which had ruled on the matter, in a decision endorsed by the Government of Colombia, and second because the opinion referred to is not binding."

4.7 On 23 September 2002, the Civil Appeals Chamber of the Supreme Court rejected an application for *amparo* made by the author, who claimed he had not been identified as the person sought for extradition. The Chamber asserted that the issue had been amply clarified by the Criminal Appeals Chamber and the ruling in favour of extradition did not appear arbitrary, capricious, in conflict with the law, or a violation of the rights referred to, which was reason enough to reject the application for *amparo*. The Chamber recalled that the decision permitting extradition had been unsuccessfully appealed against. As it was an administrative matter, an appeal ought to have been lodged through the judicial review system, so as to establish whether or not there had been a breach of fundamental rights or an infringement of procedural safeguards. No such appeal had been made, and the application for *amparo* was thus inadmissible.

4.8 The State party argues that the present communication is inadmissible. From the decisions handed down during the extradition proceedings it may be inferred that the author is the person whose extradition was formally requested by the United States Government. Moreover, the nature of the extradition procedure does not admit of any review of matters implying an estimation of the criminal responsibility of the person sought. If he claims he is not the man who has violated the laws of the applicant country, that must be settled during the criminal proceedings held abroad.

4.9 The extradition procedure allowed under Colombian law provides judicial defence mechanisms for guaranteeing the fundamental rights of the citizen sought. From the start of the procedure, the author was assisted by counsel who exercised his right to a defence, exploiting all the remedies provided for under the law.

4.10 The State party applied the laws in force with complete respect, not only for the relevant domestic and international standards but for all legal safeguards as well, so that there are no grounds for claiming a violation of the Covenant. It would seem that an effort is being made to utilize the Committee as a fourth level of review for domestic decisions that have gone against the author's claims.

4.11 The author appealed against the administrative ruling allowing his extradition. That ruling was confirmed in executive decision No. 96 dated 1 August 2002, it being understood that administrative remedies were thereby exhausted. This is why judicial review provides another method of starting a procedure to make sure the law is complied with - another reason for ruling the communication inadmissible, inasmuch as domestic remedies have not been exhausted.

5. In his reply of 9 February 2003, the author alleges that no ruling could be made for him to be extradited: multiple identities, 11 in all (sic), distinguishing marks and physical features were being put forward to identify the person sought, but none of them matched or resembled those of Marco Antonio Arboleda Saldarriaga. To back his claim, the author lists all the supposed distinguishing features that provided grounds for extraditing Marco Antonio Arboleda Saldarriaga. His name is given in different documents as variously: Luis Carlos Zuluaga Quiceno, Marcos Arboleda Saldarriaga, Marcos Antonio Arboleda Saldarriaga, Marco Antonio Arboleda Saldarriaga, Mario Antonio Arboleda Saldarriaga, and Raúl Vélez, as well as the individual portrayed in a photograph from the file submitted by the applicant State.

State party's observations on the merits

6.1 In a document dated 21 March 2003, the State party noted that the author had been detained under "Operation Millennium", a joint operation by the Colombian authorities and the Government of the United States, to fight gangs of drug traffickers. This operation was carried out on 13 October 1999 in Bogotá, Cali and Medellín, and other countries such as Mexico and the United States.

6.2 The Government of the United States requested the arrest and extradition of 30 Colombian citizens involved in trafficking; the arrests were ordered by the Colombian Attorney-General's Office. Counsel for the author was actively involved from the start of the extradition proceedings. He made the following applications for relief: an appeal for reconsideration of the order of the Criminal Appeals Chamber of the Supreme Court dated 22 May 2001, which had rejected his petition to produce evidence; an appeal for reconsideration of the decision of 27 May 2002 permitting his extradition; and three applications for *amparo* protection from violation of his right to due process, laid before the 60th Bogotá Municipal Criminal Court and 41st Criminal Circuit Court, before the Civil Appeals Chamber of the Supreme Court, and before the Jurisdictional Disciplinary Chamber of the District Judiciary Council of Cundinamarca, respectively. The author also petitioned the Attorney-General of Colombia for his release, which was denied by decision of 12 September 2001 on the grounds, inter alia, that the person sought for extradition was fully identified.

6.3 The State party repeats the statements of the Supreme Court as to the identity of the author and the corrections made by the applicant State, and its conclusion that there was no doubt about the identity of the citizen sought for extradition. It had been shown that Marco Antonio Arboleda Saldarriaga, named in the formal extradition request, was the person arrested and ultimately handed over to the authorities of the applicant country.

Issues and proceedings before the Committee

7.1 Pursuant to rule 93 of its rules of procedure, before considering a claim contained in a complaint, the Human Rights Committee must decide whether it is admissible under the Optional Protocol to the Covenant.

7.2 The Committee has ascertained, under article 5, paragraph 2 (a), that the same matter has not already been submitted under another procedure of international investigation or settlement.

7.3 The author alleges that he was detained in contravention of article 9 of the Covenant, in that the documentation it was based on did not meet the requirements of law as to the identity of the person detained. He also alleges that, contrary to article 14 of the Covenant, the Supreme Court did not respect his right to due process in the proceedings that led to a ruling being made to extradite him, as he was not allowed to produce evidence in proof of his identity. The Committee observes that the author's complaints were considered by the competent authorities through the various appeals he had made. The Committee points out in this context its repeated jurisprudence that in principle it is the task of States parties to evaluate the facts and evidence unless their evaluation has been plainly arbitrary or constitutes a denial of justice.[1] The Committee considers that the author has failed, for the purpose of admissibility, to show that the conduct of the courts of the State party amounted to arbitrariness or a denial of justice, and therefore declares the author's claims inadmissible under article 2 of the Optional Protocol.

8. The Human Rights Committee therefore decides that:

(a) The communication is inadmissible under article 2 of the Optional Protocol;

(b) This decision should be transmitted to the author and to the State party.

[Adopted in English, French and Spanish, the Spanish text being the original version. Subsequently to be issued in Arabic, Chinese and Russian as part of the Committee's annual report to the General Assembly.]

Note

[1] See, among others, communications Nos. 811/1998, *Mulai v. Guyana*; 867/1999, *Smartt v. Guyana*; 917/2000, *Arutyunyan v. Uzbekistan*; 927/2000, *Svetik v. Belarus*; 1006/2001, *Martínez Muñoz v. Spain*; 1084/2002, *Bochaton v. France*; 1138/2002, *Arenz v. Germany*; 1167/2003, *Ramil Rayos v. Philippines*; and 1399/2005, *Cuartero Casado v. Spain*.

N. Communication No. 1175/2003, *Lim Soo Ja v. Australia* (Decision adopted on 25 July 2006, eighty-seventh session)*

Submitted by:	Mrs. Soo Ja Lim; her daughter, Seon Hui Lim, and her son, Hyung Joo Scott Lim (represented by counsel, Ms. A. O'Donoghue)
Alleged victim:	The authors
State party:	Australia
Date of communication:	24 January 2003 (initial submission)
Subject matter:	Expulsion of mother and daughter, but not son, from Australia to Republic of Korea
Procedural issues:	Exhaustion of domestic remedies - substantiation, for purposes of admissibility
Substantive issues:	Interference with family life - protection of the family unit
Articles of the Optional Protocol:	2 and 5, paragraph 2 (b)
Articles of the Covenant:	17 and 23

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 25 July 2006,

Adopts the following:

Decision on admissibility

1. The authors of the communication, dated 24 January 2003, are Mrs. Soo Ja Lim, a national of the Republic of Korea born 15 January 1948, her daughter, Seon Hui Lim, a Korean national born 28 August 1971, and her son, Hyung Joo Scott Lim, a Korean national born

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* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Nisuke Ando, Mr. Prafullachandra Natwarlal Bhagwati, Mr. Maurice Glèlè Ahanhanzo, Mr. Edwin Johnson, Mr. Walter Kälin, Mr. Ahmed Tawfik Khalil, Mr. Rajsoomer Lallah, Ms. Elisabeth Palm, Mr. Rafael Rivas Posada, Sir Nigel Rodley and Mr. Hipólito Solari-Yrigoyen.

Pursuant to rule No. 90 of the Committee's rules of procedure, Committee member Mr. Ivan Shearer did not participate in the adoption of the present decision.

20 July 1977 and at the time of submission of the communication also a naturalized Australian national. The authors claim to be victims of violations by Australia of their rights under articles 17 and 23 of the Covenant. They are represented by counsel, Ms. A. O'Donoghue.

Factual background

2.1 On 14 March 1987, Mr. Ha Sung Lim arrived in Sydney, Australia on a visitor's visa. In 1988, he was diagnosed with cancer. On 6 April 1989, his wife, Mrs. Soo Ja Lim, and son, Hyung Joo Scott Lim, arrived in Sydney on temporary entry permits for a stay of 6 months. On 14 September 1989, his daughter, Seon Heui Lim, also arrived in Sydney with the same type of permit. The following day, Mr. Lim died.

2.2 On 6 October and 14 November 1989, respectively, the permits of the surviving members of the family expired. In January 1990, Mrs. Lim's brother, Mr. Woo Ki Park, returned to the Republic of Korea. On 19 March 1991, Mrs. Lim lodged an application on behalf of her family to remain permanently in Australia 'under concessions for persons illegally in Australia' (Form 903). On 13 January 1993, the family was advised that the application was rejected due to not providing a so-called "nominator".

2.3 On 9 February 1993, Mrs. Lim lodged another Form 903 application which included a nominator. On 16 August 1993, the application was rejected as inadmissible. On 18 August 1993, the Department of Immigration ("the Department") advised the family of its intention to seek a deportation order against them. On 3 December 1993, the family received a further letter advising them of Department's intention to deport.

2.4 On 17 December 1993, the daughter lodged a transitional permanent visa application with her partner, Mr. Jung Hee (Anthony) Lee, as nominator. On 21 December 1993, the son wrote to the Minister for Immigration and Multicultural Affairs ("the Minister") requesting residency on compassionate grounds. On 8 February 1994, the Minister replied that he could only intervene in cases which had been reviewed by the Migration Review Tribunal. He noted that the Lim family had not applied for review by the Tribunal, and that it had become too late to do so.

2.5 On 1 September 1994, the Lim family was granted a "Bridging Visa E". In 1995, Mrs. Lim's parents in the Republic of Korea died suddenly. On 27 September 1995, the daughter was advised that her transitional permanent visa application had been refused due to a lack of change in her personal circumstances. On 13 December 1996, she received a letter from the Department with formal notice of its intention to cancel the bridging visas.

2.6 On 23 and 27 December 1996, respectively, the son and the daughter wrote to the Department in response to the letter advising of intention to cancel their bridging visas. On 26 May 1997, the Department wrote advising of the cancellation of bridging visas as the application for permanent residency had been found inadmissible.

2.7 On 4 June 1997, the Lim family applied for protection visas. On 5 June 1997, a Bridging Visa was granted. On 13 June 1997, the applications for protection visas were rejected. On 1 July 1997, the son lodged an application to remain in Australia on the basis of being an innocent illegal. On 2 July 1997, the Lim family applied to the Refugee Review Tribunal for review of the decision to refuse protection visas. On 6 March 1998, Mrs. Lim and her daughter became parties to a class action suit in Federal Court, entitled *Macabenta v. Minister for Immigration & Multicultural Affairs*.[1] On 31 March 1998, they both applied for "Resolution of Status" visas. On 1 April 1998, the Department responded that they did not meet the requirements for making a valid application under the Resolution of Status visa class.

2.8 On 15 April 1998, the son was granted permanent residency on the basis that he lived independently from his family. On 21 April 1998, the Federal Court dismissed the class action suit. On 22 October 1998, the Refugee Review Tribunal heard the application for review of denial of protection visas. On 23 November 1998, the Tribunal refused the application.

2.9 On 18 December 1998, a Full Bench of the Federal Court dismissed an appeal against the first instance decision on the class action suit. On 18 June 1999, the High Court of Australia rejected an application for special leave to appeal in the same case. On 25 June 1999, Mrs. Lim and her daughter were advised to join another representative class action in the High Court regarding the decisions of the Refugee Review Tribunal. On 16 July 1999, the bridging visa provided for the original class action application expired. On 26 July 1999, Mrs.Lim and her daughter were advised that they could not join the class action regarding the Refugee Review Tribunal, as the Tribunal had had before it all relevant information for its decision on their application by the Lim family.

2.10 On 31 August 1999, Mrs. Lim and her daughter requested the Minister to exercise his discretion under section 417 of the Migration Act 1958. On 2 September 1999, Mrs. Lim and her daughter applied for a bridging visa (Class E) whilst their submission to the Minister was being considered. On 15 May 2000, the Minister decided not to exercise his discretion.

2.11 On 17 May 2000, the family's solicitors advised of the Minister's decision and noted that there did not appear to be any other options available to them. On 24 May 2000, Mrs. Lim requested an extension of one month from her scheduled departure on 7 June 2000. On 24 May 2000, Mrs. Lim was granted a bridging visa until 6 June 2000. On 6 June 2000, Mrs. Lim's bridging visa expired. On 16 August 2000, the son acquired Australian citizenship, and in 2001 he completed university.

The complaint

3.1 The authors invoke the Committee's Views in *Winata v. Australia*,[2] and argue on that basis that the present communication discloses violations of articles 17 and 23 of the Covenant. On article 17, they argue that the removal of Mrs. Lim and her daughter from Australia would amount to an 'interference' with the Lim family. They contend that for the son to leave Australia with Mrs. Lim and her daughter, to relocate to the Republic of Korea would not be in accordance with the provisions, aims and objectives of the Covenant, nor be reasonable in the particular circumstances. They argue that they have developed into a highly cohesive and interdependent family after the death of Mr. Lim, the location of his grave being also in Australia. His daughter pledged to her father to look after the family in Australia, and the family unit itself is therefore inextricably linked to their residence in Australia. For the same reasons, the authors argue that removal of Mrs. Lim and her daughter from Australia would amount to a violation of article 23 (1) of the Covenant.

3.2 On exhaustion of domestic remedies, the authors submit that the communication relates only to the possible break-up of the family and, as such, it is only in relation to this aspect of their various applications that they would be required to exhaust domestic remedies, or alternatively show that such remedies would be futile.

State party's submissions on admissibility and merits

4.1 By submission of 3 February 2004, the State party argued that the communication should be declared inadmissible, on grounds of failure to exhaust available domestic remedies, as an abuse of the right of submission, and as insufficiently substantiated. On the merits, the State party argues that there has been no violation of the Covenant.

4.2 As to the admissibility of the claims both under articles 17 and 23, the State party argues that domestic remedies have not been exhausted, detailing a series of remedies available to the Lim family. Firstly, the State party notes that the family had not exercised in timely fashion its right to apply for review by the Migration Review Tribunal (MRT) of the decision to deny permanent residence, as the Minister's letter of 8 February 1994 had noted. The State party refers to the Committee's jurisprudence requiring compliance with time limits, and thus argues that the authors failed to make a reasonable effort to exhaust all available domestic remedies at the time when it was appropriate for them to do so.

4.3 Even if the MRT had not decided the application in favour of the Lim family, they could have sought review in the Federal Court of Australia. If unsuccessful, the family could have appealed to the Full Federal Court and applied for special leave to appeal to the High Court of Australia (the High Court) if they received an adverse decision from the Full Federal Court. As an alternative to seeking review by the Federal Court, the Lim family would have been entitled, under the Australian Constitution, to seek judicial review of the decision of the Migration Review Tribunal's decision by the High Court of Australia in its original jurisdiction.

4.4 Secondly, the State party notes that decisions of the Refugee Review Tribunal (RRT) are also subject to judicial review in the Federal Court and High Court. The authors did apply to the Federal Court, but as parties to a class action regarding "Resolution of Status visas (850 and 851)" on the grounds that the visa class was discriminatory. Yet they chose not to seek judicial review of the decision of the Refugee Review Tribunal relating to their application for protection visas, when it was open for them to do so.

4.5 Thirdly, the State party observes that although the current claim refers to the possible future separation of the family unit, the author noted that this was referred to in their claims for a protection visa – the State party submits that they are therefore related. Both the Form 903 application and the protection visa application raised the current issues before the Committee. The author notes that the decision maker clearly acknowledged the issues surrounding the possible future separation of the family unit. These issues were raised also in the application made to the Minister under section 417 of the *Migration* Act 1958. An appeal to the higher courts on both grounds was therefore an available domestic remedy, when these applications were submitted, and both mechanisms offered a reasonable prospect of redress.

4.6 The State party further argues that both claims constitute an abuse of the right of submission, as the Covenant is designed to ensure and protect the basic human rights of all persons, not to assist persons whose rights are in no way being breached but who wish to obtain a preferred migration outcome. The Lim family is not currently experiencing any interference with their human rights in Australia, where it continues to live. There is no evidence that the family (or members of it) would suffer a breach of their rights if they return to the Republic of Korea. It is clear that the Lim family would prefer to remain in Australia, but the Covenant does not guarantee a right to choose a preferred migration outcome.

4.7 The State party concedes that the family has been in Australia for many years, but argues that this is principally because they remained in Australia without lawful authority for approximately fourteen years. It would be manifestly unfair on the State Party if the Lim family were able to rely on this fact as the basis for their claim. The State party denies that it is seeking to break up the family unit. While the Lim family remains in Australia lawfully, there is nothing to prevent them remaining together as a family unit. If Mrs. Lim and her daughter are to return to the Republic of Korea, there is nothing to prevent her son from returning to the Republic of Korea with his family. Mr. Lim., as an independent adult, may also choose to remain in Australia and maintain contact with his family by various means. That would be his choice and not a consequence of any action by the State party. It is conceded by the Lim family that it would not face persecution or other forms of personal danger if they returned to the Republic of Korea.

4.8 In the State party's view, the authors' submissions show little more than that the family would prefer to remain in Australia and that they would experience a level of disruption to their lives if they are required to move back to the Republic of Korea. The apparent motivation for this submission is not concern over interference with family life or other breach of rights guaranteed by the Covenant - it is the Lim family's concern to ensure that they achieve their preferred migration outcome. The State party submits that in these circumstances, the communication should be rejected as an abuse of the right of submission.

4.9 On the claim under article 23, the State party argues that the claim is insufficiently substantiated, for purposes of admissibility. It notes that the authors argue that a breach of article 17 necessarily gives rise to a breach of Article 23 (1), for in breaching article 17, the State Party has consequently failed to provide the protection under article 23 (1) to which all families are entitled. The State party points out that the authors' submissions provide arguments that appear to be directed towards establishing an alleged interference with the family, under article 17, but which provide no argument whatsoever as to why or how the State party would be in breach of article 23 (1) if it were to remove Mrs. Lim and her daughter from Australia.

4.10 The State party argues that while the two articles are related, they remain distinct obligations. While, article 17 is an essentially negative protection, aimed at prohibiting arbitrary or unlawful interference with the family, article 23 (1) involves positive obligations with regard to the institution of the family. Information directed at establishing a breach of article 17 will not necessarily establish claims under article 23 (1). The family, as a "natural and fundamental group unit of society" and as an institution under private law, receives special institutional protection in article 23. On the other hand, article 17 is limited to the protection of the privacy of individual family members, as expressed in family life, against unlawful or arbitrary interference. As no part of the communication provides any expansion on the claim that the State party would be in violation of article 23 (1), this claim should accordingly be declared inadmissible as insufficiently substantiated.

4.11 On the merits of the article 17 claim, the State party disputes that there has been the necessary "interference" with a "family", which is either unlawful or arbitrary. The authors themselves concede that the removal of Mrs. Lim and her daughter would be lawful under its domestic law, by reason of the operation of the *Migration* Act 1958. Even if the removal of Mrs. Lim and her daughter was considered to be 'interference' within the meaning of article 17 (1), such interference would not be arbitrary. Australia's immigration laws and policies seek to strike a reasonable balance between the need to allow people to come and go from Australia and other aspects of the national interest. That immigration control is a legitimate purpose for States to pursue consistent with their obligations under the Covenant is clear from articles 12 and 13 of the Covenant. The removal of Mrs. Lim and her daughter, in accordance with Australian immigration law, is a reasonable and proportionate way of achieving that purpose.

4.12 On the merits of the claim under article 23, it is argued that this provision concerns protection of the family as an institution , as set out in the Committee's general comment No.19. The State party contends that article 23, like article 17, must be read against the background of the State party's acknowledged right, under international law, to control the entry, residence and expulsion of aliens. It protects families within its jurisdiction, but such protection must be balanced against the need to take reasonable measures to control inward immigration. Australia clearly meets the obligation under article 23 (1). At the federal level, there is a comprehensive system of family law which covers a wide range of issues, from marriage to custody of children and divorce. The State and Territories all have rigorous child protection laws, all backed up by State and Territory Government departments and specialist units.

Authors' comments on the State party's submissions

5.1 On 6 April 2004, the authors responded, disputing the State party's submission on both admissibility and merits. To their additional reasoning on domestic remedies, the authors add that the initial visa application - which under Australian law is most likely to succeed - was made by Mrs. Lim on behalf of the family on the incorrect advice of a migration agent who can no longer be located. As the family did not qualify, it would not have been possible for the MRT to find in their favour. The authors also note that they could not pay the application fee for a review application. They note that the request for Ministerial intervention was made by the son, aged 14, and thus was insufficiently persuasive and legally founded.

5.2 In arguing that their removal was disproportionate to its aim, the authors argue that in this case there is an unusually high level of interdependence between the family members, which would make removal particularly cruel. Despite family difficulties, they have always supported themselves financially and have contributed to the Australian community. The family has deep emotional ties to Australia, as Mr. Lim's grave is there.

5.3 In response to the State party's contention that they had remained unlawfully in Australia for fourteen years, the authors note that they enjoyed a number of bridging visas. Their unlawful status resulted from the absence of domestic remedies available appropriately to protect the family unit. The family had to remain in Australia in order to satisfy the wishes of their dying father.

5.4 As to the son's ability to move to the Republic of Korea with the rest of his family, the authors note that he arrived in Australia at the age of 11, graduated there from high school and university and has established himself there as a solicitor. He would need to seek permission from the Minister of Justice for reinstatement of Korean nationality and would have to renounce Australian citizenship. Return to the Republic of Korea, in order to preserve the family unit, would be impractical and difficult for him.

Issues and proceedings before the Committee

6.1 Before considering any claim contained in a communication, the Human Rights Committee must, in accordance with rule 93 of its rules of procedure, decide whether or not it is admissible under the Optional Protocol to the Covenant.

6.2 As to the issue of exhaustion of domestic remedies, the Committee notes that the authors did not apply for review by the Migration Review Tribunal of their applications for permanent residence, and thus became time-barred. They also attribute responsibility for the failure of the permanent residency process to the incorrect advice of a migration agent, whose location could no longer be determined. The Committee observes that, according to its jurisprudence, an author is required to abide by reasonable procedural requirements such as filing deadlines, and that the default of an author's representative cannot be held against the State party, unless in some measure due to the latter's conduct. In this communication, there is no indication of any such State responsibility. The Committee also notes that the authors did not pursue subsequent judicial review of the adverse determination of the Refugee Review Tribunal. While in the case of Winata the Committee did not require this course, in that instance the authors' refugee claims were wholly distinct from the claims before the Committee. In the present case, by contrast, it is uncontested that the family circumstances at issue before the Committee were advanced in the application for a protection visa, and thus were made a live issue before the State party's authorities and tribunals. In these circumstances, therefore, the communication must be declared inadmissible for failure to exhaust domestic remedies, as required by article 5, paragraph 2 (b), of the Optional Protocol.

7. The Human Rights Committee therefore decides that:

(a) The communication is inadmissible under article 5, paragraph 2 (b), of the Optional Protocol;

(b) This decision shall be communicated to the authors and to the State party.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the Committee's annual report to the General Assembly.]

Notes

[1] [1998] 385 FCA (21 April 1998): On 13 June 1997, the Minister for Immigration and Multicultural Affairs announced the Government's decision to resolve the uncertainty surrounding the future status of certain groups of people who, for humanitarian reasons, had been allowed to remain in Australia as long term temporary residents. This was to be effected by creating new visa classes to cover persons from Sri Lanka, countries in the former Yugoslavia region, Iraq; Kuwait; Lebanon, and the People's Republic of China. These categories of visas came to be known as Resolution of Status Visas (850 and 851) and were given statutory effect through Statutory Rule (SR) 279 of 1997. An application was brought by Ms. Macabenta as a representative party in respect of a group of 690 applicants, comprising nationals of a number of countries. The applicant sought a declaration under s 10 of the Racial Discrimination Act 1975 (Cth) that, by reason of provisions of Statutory Rule No 279 of 1997, the group members did not enjoy a right enjoyed by persons of other national origins.

[2] Case No. 930/2000, Views adopted on 26 July 2001.

O. Communication No. 1183/2003, *Martinez Puertas v. Spain* (Decision adopted on 27 March 2006, eighty-sixth session)*

Submitted by:	Salvador Martínez Puertas (represented by counsel)
Alleged victim:	The author
State party:	Spain
Date of communication:	13 September 2001 (initial submission)
Subject matter:	Judgement of the Spanish Supreme Court inconsistent with existing case law; failure to communicate to the author the opinion of the Public Prosecutor's Office regarding the appeal
Procedural issues:	Insufficient substantiation of the alleged violations
Substantive issue:	Equal treatment before the courts, "equality of arms", principle of adversarial proceedings
Article of the Covenant:	14, paragraph 1
Article of the Optional Protocol:	2

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 27 March 2006,

Adopts the following:

Decision on admissibility

1. The author of the communication, which is dated 13 September 2001, is Salvador Martínez Puertas, a Spanish national, who alleges that he is a victim of violations by Spain of article 14, paragraph 1, of the Covenant. The Optional Protocol entered into force for the State party on 25 April 1985. The author is represented by counsel, Mr. José Luis Mazón Costa.

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* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Nisuke Ando, Mr. Prafullachandra Natwarlal Bhagwati, Ms. Christine Chanet, Mr. Maurice Glèlè Ahanhanzo, Mr. Edwin Johnson, Mr. Walter Kälin, Mr. Ahmed Tawfik Khalil, Mr. Rajsoomer Lallah, Mr. Michael O'Flaherty, Ms. Elisabeth Palm, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Ivan Shearer, Mr. Hipólito Solari-Yrigoyen and Mr. Roman Wieruszewski.

Factual background

2.1 The author worked as a janitor for the Municipal Sports Institute of the municipality of Murcia (hereinafter the Institute). He had signed a contract of employment on 2 April 1996, and was carrying out maintenance work in sports facilities in municipal swimming pools.

2.2 On 31 March 1998, the author signed the following settlement with the Institute: "Employer. Municipal Sports Institute. Breakdown of the settlement: Salary 73,310; summer premium 36,654; local supplement 42,909; specific allowance 29,798; average hourly earnings 10,000; special availability allowance 15,315. Total 207,987. (Less) Personal income tax 14,559, social security 11,712; balance 181,716. I, the undersigned, Salvador Martinez Puertas, declare that I hereby receive from the above-mentioned employer one hundred and eighty-one thousand seven hundred and sixteen pesetas, in payment of services rendered for this employer until the present day, in accordance with legislation in force and taking into account payments received to date, thus settling all accounts to my full satisfaction and releasing the company from any further claims whatsoever. I hereby agree to the present final settlement of accounts, which cancels the contract of employment signed with the said employer in Molina de Segura."

2.3 The Institute terminated his contract of employment on that same day, 31 March 1998. On 26 May 1998, the author filed an application for unjustified dismissal, in which he stated that the settlement listed only certain outstanding items, contained no provision for a severance payment and did not constitute a discharge from employment. In its ruling of 30 September 1998, Employment Tribunal No. 3 of Murcia acceded to the request in part, declaring the dismissal unlawful and instructing the Institute to reinstate the author with immediate effect. The tribunal considered that the settlement did not contain "the necessary elements to indicate the clear intent to terminate the contract" and that it did not release the Institute from its obligations, since the amounts outstanding were not paid in full.

2.4 In November 1998, the Institute appealed by means of an application for reversal of the tribunal's decision, asserting that the settlement released the Institute from its obligations and terminated the employment relationship. In January 1999, the author opposed the application, invoking Supreme Court case law relating to the conditions which a settlement must meet in order to terminate the employment relationship. Under that case law, signing a settlement does not automatically imply consent to terminating the employment relationship. Rather, the text must give a clear and unequivocal indication of the employee's intention to end the employment relationship. On 23 February 1999, the Employment Division of the Superior Court of Justice in Murcia granted the Institute's application and annulled the judgement of Employment Tribunal No. 3 of Murcia. The Division considered that the terms of the settlement were sufficiently clear and that there had been an intent to terminate the employment relationship. The author maintains that the Division's ruling is inconsistent with Supreme Court case law.

2.5 The author filed an appeal for unification of doctrine. This remedy aims at ensuring consistency in court rulings on cases whose factual circumstances are identical. The author invoked a judgement handed down by the Employment Division of the Supreme Court on 24 June 1998 respecting a situation which, in the author's view, was identical to his own. In its judgement, the Court had granted an application from a person who had temporarily taken a second job and who, at the end of the contract, had signed a proportional settlement confirming "receipt of a certain sum as final payment and settlement at the end of the contract". The document further stated that "for the purpose of the present settlement, I declare that I have received all current and future entitlements, thus relinquishing any further claims or compensation".

2.6 On 22 November 1999, during the appeal, the Employment Division, acknowledging that there might be grounds for dismissing the appeal, ordered a hearing for the author and requested the Public Prosecutor's Office to advise on the admissibility of the request. The Public Prosecutor's Office issued an opinion advocating the dismissal of the appeal, but the author claims that he was never informed of the opinion, nor was he given the opportunity to comment on its contents. Under article 224 of the Spanish Labour Procedure Act, the Public Prosecutor's Office, if it is not the plaintiff, is required to issue an opinion on the admissibility of the appeal. This opinion is not binding on the court. In its judgement of 3 February 2000, the Employment Division of the Supreme Court dismissed the appeal and considered that no contradiction could be found between the two judgements invoked by the author. The Division considered that the settlements were worded differently, and that the one signed by the author was much more explicit.

2.7 The author filed an application for *amparo* with the Constitutional Court, alleging a violation of his right to equal treatment before the courts and maintaining that the Supreme Court's decision was based on illogical and irrational grounds. He also alleged that the fact that he was not given the opportunity to comment on the contents of the Public Prosecutor's opinion violated his right to adversarial proceedings in the appeal. In respect of this allegation, the author cited the judgement of the European Court of Human Rights of 20 February 1996 in the case of *Lobo Machado v. Portugal*, according to which the fact that it was impossible for the plaintiff to obtain a copy of the opinion before judgement was given and reply to it infringed his right to adversarial proceedings. That right meant the opportunity for the parties to a criminal or civil trial to have knowledge of and comment on all evidence adduced or observations filed, even by an independent member of the national legal service, with a view to influencing the court's decision.

The complaint

3.1 The author alleges a violation of article 14, paragraph 1, of the Covenant, because the Employment Division rejected his appeal for unification of doctrine on the grounds that the decision handed down in the author's case and that with which it was being contrasted were not identical, whereas in the author's view there was no substantive difference between the two situations on which the decisions were based. The author adds that the conclusion reached by the Division is arbitrary, illogical, irrational and capricious. He considers that the arbitrariness is manifest and constitutes a denial of justice.

3.2 The author further alleges a violation of article 14, paragraph 1, of the Covenant because he was not provided with the opinion of the Public Prosecutor's Office advocating the dismissal of his appeal and was thus denied the opportunity to reply to it.

State party's observations on admissibility and the merits and author's comments

4.1 According to the State party, the communication is inadmissible, since it constitutes an abuse of the right of submission, manifestly lacks merit and is incompatible with the provisions of the Covenant. The State party considers that the author was given access to the courts repeatedly and secured well-founded legal decisions in which the competent judicial organs replied in detail to his allegations. The State party indicates that the author alone alleges unequal treatment, a claim expressly refuted by the Division that handed down the judgement the author uses as a comparison. The State party considers that the communication lacks merit and that the author is using the mechanism of the Optional Protocol to raise an issue that has already been the subject of adequate examination, free of arbitrariness, and has been resolved in accordance with due process of law.

4.2 With respect to the merits of the communication, the State party points out that the author believes his situation to be identical to that of another person who obtained a favourable Supreme Court judgement. However, the terms of the settlement agreement signed by the author differ from those of the case with which it is being contrasted to substantiate the complaint and, the State party adds, the Supreme Court so informed the author supplying the grounds for this view and affirming that "no contradiction can be found between the two decisions that are being compared, which concern the consequences and purpose of different settlements; the documents are worded differently, which in itself could be grounds for issuing a different ruling in each case. The wording of the document detailing the amounts received and terminating the contract of employment is much more explicit than that of the document with which it is being contrasted. The latter merely acknowledges receipt of a given amount as final payment and settlement, without any specific reference to the intent to terminate the employment relationship".

4.3 The State party further affirms that the Constitutional Court replied promptly to the author's allegation, pointing out that "this specific allegation cannot be used as grounds for seeking *amparo*, since assessing whether the legal requirements for access to a given remedy have been met is the exclusive right of the competent judicial body. Consequently, the dismissal of an application can be appealed by way of *amparo* only if the decision was manifestly arbitrary or unfounded. It is clear that none of these circumstances apply in the present case, in which the dismissal of the appeal is based on the provisions of articles 217 and 223 of the Labour Procedure Act, since the Employment Division of the Supreme Court considered in a reasoned and substantiated manner, in application of its own settled and reiterated case law, that the allegedly challenged judgement cited in the *amparo* application did not lend itself to adversarial proceedings, so that there are no grounds for challenging the judgement from the constitutional standpoint".

4.4 With regard to the alleged violation of the right to adversarial proceedings, the State party cites part of the Constitutional Court decision on the *amparo* application filed by the author: "A second allegation relates to the possible breach of the fundamental right to adversarial proceedings during the appeal, since the applicant for *amparo* was unable to comment on the opinion of the Public Prosecutor's Office; the judgement delivered by the European Court of Human Rights on 20 February 1996 (the *Lobo Machado v. Portugal* case) is mentioned to support this allegation. It should be added that the situations which gave rise to the aforementioned judgement and the one giving rise to the present controversy are insufficiently similar to prompt similar solutions in the two cases. In the case adjudicated by the European Court of Human Rights, a member of the Attorney-General's department took part in the court's deliberations in private alongside three judges and the registrar of the Supreme Court, thus fully participating in the decision-making process. In the case adjudicated by this Court, on the other hand, the Public Prosecutor's intervention was limited to issuing an opinion on the admissibility of the appeal, pursuant to article 224 of the Labour Procedure Act. It can therefore be concluded that the appellant's right to a defence in the present case was not violated, since the opinion merely refers to issues pertaining to the due process of law and protection of the public interest, in full compliance with the functions the Spanish Constitution assigns to the Public Prosecutor's Office. Such opinions are not binding on the adjudicating court and do not have the force of decisions. They cannot therefore be interpreted as violating the fundamental right to adversarial proceedings in any way."

5.1 In his submission dated 5 November 2004, the author maintains that he lost his job at the Sports Institute as a result of an arbitrary act on the part of the Employment Division of the Supreme Court, which denied him the right to the same treatment as that accorded in a similar case. In the case examined by the Supreme Court in its judgement of 24 June 1998, the rights of the worker were recognized, although he had signed the following text: "For the purpose of the present settlement, I confirm receipt of payment for all current and future entitlements, thus relinquishing any further claims or compensation." The author states that his circumstances did not justify a final settlement, although the document he signed was identical to the one mentioned earlier, stating: "thus settling all accounts to my full satisfaction, with no amount remaining to be claimed on any other grounds". Both documents contained a breakdown of the items for which the claimants received financial compensation, excluding severance payments. According to the author, the Supreme Court failed to compare the two employment severance agreements in an objective and reasonable manner. The author further states that, while both documents clearly terminate an employment relationship following a temporary contract of employment, the 1998 judgement declares the worker's temporary contract of employment null and void and the settlement is also considered null and void on the grounds that the employer had violated the law on employment contracts and that the worker's relinquishment of his labour rights was invalid, while the author's claims were dismissed.

5.2 The author adds that neither the Supreme Court nor the Constitutional Court examined the specificities of his case, or the substance of the problem, or the similarities and differences between the two settlements being contrasted, and formulated only observations of a general nature. The author cites the Committee's general comment No. 13 and adds that when a court issues different rulings on two cases without sufficient grounds, this creates the impression that the court's decisions are arbitrary, unjust and capricious. He maintains that the administration of justice in Spain generally infringes the principles articulated in article 14 of the Covenant. In the author's view, this circumstance is partly due to poor selection criteria in the appointment of judges, ineffective mechanisms to hold judges accountable, and the existence of a strong *esprit de corps*. He adds that the courts hide this abuse behind deceptive language which is lacking in rationality and objectivity, as well as by misrepresenting and manipulating arguments. He further points out that, in the view of distinguished experts, the Constitutional Court "serves no purpose", since only a very small percentage of *amparo* applications for violations of fundamental rights are examined thoroughly.

5.3 The author maintains, with respect to the State party's claim that the *Lobo Machado* case adjudicated by the European Court of Human Rights is different to his own, that the State party distorts the substance of the judgement. According to the author, the European Court ruled that "this fact in itself" - namely the failure to send to the plaintiff a copy of the Deputy Attorney-General's opinion, and the fact that he was unable to challenge the Deputy Attorney-General's arguments in favour of dismissing his appeal - "amounts to a breach of article 6, paragraph 1" of the European Convention on Human Rights. The author further states that the State party "manipulated" the European Court's case law, thus, in his view, committing a further violation of article 14, paragraph 1, of the Covenant.

Issues and proceedings before the Committee

6.1 Before considering any claim contained in a communication, the Human Rights Committee must, in accordance with rule 93 of its rules of procedure, decide whether the complaint is admissible under the Optional Protocol to the Covenant on Civil and Political Rights.

6.2 The Committee has ascertained that the same matter is not being examined under another procedure of international investigation or settlement for the purposes of article 5, paragraph 2 (a), of the Optional Protocol. The Committee further notes that the State party has not submitted any information suggesting the non-exhaustion of domestic remedies, and therefore considers there to be no impediment to examining the communication under article 5, paragraph 2 (a), of the Optional Protocol.

6.3 The Committee takes note of the author's allegation that the judgement of the Supreme Court concerning the appeal for unification of doctrine was arbitrary since the differing judgements related to situations with identical factual circumstances. The Committee considers that the allegation relates in substance to the assessment of facts and evidence by the Spanish courts. The Committee recalls its jurisprudence and reiterates that it is generally for the courts of States parties to review or to evaluate facts and evidence, unless it can be ascertained that the conduct of the trial or the evaluation of facts and evidence was manifestly arbitrary or amounted to a denial of justice. The Committee considers that the author has not sufficiently substantiated his complaint to be able to state that such arbitrariness or a denial of justice existed in the present case, and consequently believes that this part of the communication must be found inadmissible under article 2 of the Optional Protocol.

6.4 The Committee notes that article 14, paragraph 1, of the Covenant does not oblige States parties to provide avenues for redress in respect of judgements relating to the determination of civil rights and obligations. However, the Committee considers that if a State party provides for such redress, the guarantees of a fair trial implicit in the article must be respected in that process. The Committee recalls its case law to the effect that the concept of a fair trial within the meaning of article 14, paragraph 1, of the Covenant also includes other elements, including respect for the principles of "equality of arms" and the right to adversarial proceedings. The Committee takes note of the author's complaint that, while his appeal for unification of doctrine was being processed, he was not informed of the opinion issued by the Public Prosecutor's Office opposing the granting of the appeal, which prevented him from commenting thereon. It also takes note of the author's assertion that his complaint is identical to the one in the *Lobo Machado* case, which secured a favourable ruling from the European Court of Human Rights. However, the Committee notes that the author did not challenge the intervention of the Public Prosecutor's Office before the Supreme Court; that the Public Prosecutor's Office did not act in the author's case as an interested party, but rather to uphold the due process of law and protect the public interest; that its opinion was not binding on the Court; that there is nothing in the Court's ruling that might imply that it was influenced by the opinion of the Public Prosecutor's Office; and that, in contrast to the precedent invoked by the author, the Public Prosecutor's Office did not participate in the Court's deliberations. The Committee also notes that the procedure for requesting an opinion from the Public Prosecutor's Office is provided for in article 224 of the Labour Procedure Act. Nothing in the information submitted to the Committee indicates that there are any legal obstacles that prevent the appellant from gaining access to the opinion. In the present case there is no indication that the author had attempted to ascertain the contents of the opinion before the Supreme Court decided on the inadmissibility of the appeal, or that he had brought a complaint before the Court concerning the lack of access to the opinion. The Committee further notes that the author had the opportunity to comment on the admissibility of the appeal for unification of doctrine, and that he also had ample scope for expressing his views during the proceedings. Accordingly, the Committee considers that the author has not sufficiently substantiated this part of the communication, for the purpose of admissibility, and therefore considers it to be inadmissible under article 2 of the Optional Protocol.

7. The Human Rights Committee therefore decides:

(a) That the communication is inadmissible under article 2 of the Optional Protocol;

(b) That this decision shall be communicated to the author and to the State party.

[Adopted in English, French and Spanish, the Spanish text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the Committee's annual report to the General Assembly.]

P. Communication No. 1212/2003, *Lanzarote v. Spain*
(Decision adopted on 25 July 2006, eighty-seventh session)*

Submitted by:	María Concepción Lanzarote Sánchez, María del Pilar Lanzarote Sánchez and Ángel Raúl Lanzarote Sánchez (represented by counsel, Mr. Jose Luis Mazón Costa)
Alleged victims:	The authors
State party:	Spain
Date of communication:	7 September 2001 (initial submission)
Subject matter:	Probative value attributed to attestations but denied to certified copies of a document; impartiality of the court
Procedural issues:	Insufficient substantiation of the alleged violations
Substantive issues:	Equality before the courts, equality of arms, impartiality of the court
Article of the Covenant:	14, paragraph 1
Article of the Optional Protocol:	2

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 25 July 2006,

Adopts the following:

Decision on admissibility

1. The authors of the communication, dated 7 September 2001, are María Concepción Lanzarote Sánchez, María del Pilar Lanzarote Sánchez and Ángel Raúl Lanzarote Sánchez, Spanish nationals who claim to be victims of violations by Spain of article 14, paragraph 1, of the Covenant. The Optional Protocol entered into force for the State party on 25 April 1985. The authors are represented by counsel, Mr. Jose Luis Mazón Costa.

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* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Nisuke Ando, Mr. Prafullachandra Natwarlal Bhagwati, Mr. Maurice Glèlè Ahanhanzo, Mr. Edwin Johnson, Mr. Walter Kälin, Mr. Ahmed Tawfik Khalil, Mr. Rajsoomer Lallah, Ms. Elisabeth Palm, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Ivan Shearer and Mr. Hipólito Solari-Yrigoyen.

Factual background

2.1 On 25 January 1985, the authors' father, Mr. Lanzarote, submitted an application for inclusion in the register of applications established under Act No. 37/1984 on recognition of the rights and services rendered by members of the armed forces during the Spanish civil war. The application, which was addressed to the Director-General of Personnel Costs in Madrid, had been signed by Mr. Lanzarote on 19 December 1984. When he received no response, Mr. Lanzarote sent his application again, by registered mail, on 21 April 1985.

2.2 On 23 April 1997, the Directorate General of Personnel Costs and Public Pensions of the Ministry of Finance decided to recognize Mr. Lanzarote's rights under Act No. 37/1984 in his capacity as a former major in the air force, with 31 May 1997 as his retirement date. He was granted a pension amounting to 90 per cent of his salary starting from 1 February 1997, the first day of the month following the application under consideration, which was dated 7 January 1997.

2.3 Mr. Lanzarote appealed to the Directorate General of Personnel Costs of the Ministry of Economic Affairs and Finance, requesting that the pension should be backdated to 25 January 1985, the date of the original application. Before taking a decision, the Directorate General of Personnel Costs asked Mr. Lanzarote to provide an attested photocopy of the January 1985 application, which he submitted. On 17 July 1997, the Directorate General of Personnel Costs of the Ministry of Economic Affairs and Finance rejected the appeal. According to the authors, the Directorate General of Personnel Costs deemed the attested photocopy of the January 1985 application invalid, even though the Ministry of Economic Affairs and Finance had itself authenticated the document on 4 September 1997 (sic). Mr. Lanzarote's appeal to the Central Economic Administrative Court was dismissed on 9 February 1999. On 15 April 1999, he appealed against this ruling to the administrative litigation division of the National High Court.

2.4 In the course of the appeal to the High Court, the authors' father died, and the authors found another attested photocopy (dated 19 January 1994) of his January 1985 application among his belongings. This photocopy was sent to the High Court on 5 July 2000. On 16 October 2000, the High Court rejected the appeal, considering that the submission of the application in January 1985 had not been substantiated, since attestations from the Regional Treasury of Murcia certified that there was no record of receipt of Mr. Lanzarote's applications. In the court's view, this evidence rendered the "confusing" documents provided by the authors invalid. The court concluded that article 7.2 of the State Pensioners Act, which stipulates that the economic consequences of a ruling take effect on the first day of the month following the submission of the relevant application, was applicable and that, in Mr. Lanzarote's case, only the application of 7 January 1997 was on record. The court added that it was for the authors, not the defendant (the Administration) as claimed by the authors, to prove the existence of the applications of January and April 1985. The authors claim that the High Court's ruling accepts as irrefutable evidence a unilateral declaration by the defendant, namely the attestation of the Regional Treasury of Murcia. The authors further argue that the ruling did not refer to the second attested photocopy. On 21 November 2000, the authors filed a petition for annulment of the High Court's ruling, claiming that the attested photocopy of 1994 had not been taken into account. On 23 January 2001, the High Court rejected the petition for annulment, maintaining that it had examined the document in question thoroughly but had not attributed probative value to it in the light of the negative attestation provided by the Regional Treasury of Murcia.

2.5 In November 2000, the authors filed an *amparo* application with the Constitutional Court. They claimed that: (i) the High Court's failure to rule on the second attested photocopy was arbitrary; (ii) the High Court's refusal to attribute probative value to the attested photocopy was manifestly arbitrary and violated the right to equality of arms, since the negative attestation of the Regional Treasury of Murcia had been given inordinately favourable consideration. They referred to the jurisprudence of the European Court of Human Rights, which considers that assigning undue weight to evidence submitted by one of the parties amounts to a violation of the right to equality of arms.

2.6 In February 2001, the authors filed an appeal for prorogation of the *amparo* application in relation to the High Court's ruling of January 2001, in which it had rejected the petition for annulment. The authors complained that the High Court had ruled in an arbitrary and partial manner. On 24 April 2001, the Constitutional Court rejected the *amparo* application and the appeal for prorogation of the *amparo* application. According to the authors, the Court failed to address the complaint relating to equality of arms and accused the plaintiff's lawyer of presenting the complaint in a confusing manner. In connection with another case, the authors' lawyer had filed a complaint against two of the three judges who made up the chamber of the Constitutional Court that considered the *amparo* application. Despite this, they had not disqualified themselves from hearing the appeal. The Court had further considered that it could not examine the petition for annulment, since the legislation providing for this remedy, namely the Judiciary Organization Act, did not apply to the Constitutional Court.

2.7 In its judgement, the Constitutional Court considered that there was no reason for it to review the reasons why a judicial body should attach greater credibility to one piece of evidence than to another. It stated that the High Court had indeed properly examined the attested photocopy of 1994 and that it could not accept that there had been an omission that violated the right to effective legal protection.

The complaint

3.1 The authors allege several violations of article 14, paragraph 1, of the Covenant. They contend that the principle of equality of arms was violated, since the High Court, without any legal basis, had accepted the negative attestation of the Regional Treasury of Murcia as irrefutable evidence and had not attached any probative value to other official evidence, in the form of the attested photocopies. The authors cite a ruling of the European Court of Human Rights.

3.2 The authors state that the arguments used by the National High Court in its judgement and decision concerning the petition for annulment were "manifestly arbitrary" and amounted to a "denial of justice". The High Court refuses, without reason, to recognize the probative value of the attested photocopies, which were official documents.

3.3 According to the authors, the High Court, by accepting the evidence provided by the defendant (the Administration) and rejecting that provided by the plaintiffs even though it consisted of official documents, acted in a partial manner and overstepped its competence. According to the authors, the negative attestation of the Regional Treasury certifying that the 1985 application did not appear in the official records only shows that it could have been misplaced or lost because of poor organization in the administrative services.

3.4 The authors point out that the Constitutional Court failed to resolve the complaint relating to equality of arms and groundlessly accused the authors' lawyer of presenting the case under the *amparo* procedure in a confusing manner. Also, its assertion that it could not admit the petition for annulment because the Judiciary Organization Act is not applicable to the Constitutional Court was untrue, since the Act had been applied in previous cases. They add that the Constitutional Court was not impartial, since two judges against whom the authors' lawyer had previously filed a complaint in respect of another case had participated in the proceedings in the authors' case.

State party's observations on the admissibility and merits of the communication and comments by the authors

4.1 On 7 January 2004, the State party affirmed that the communication constitutes an abuse of the right to submit communications and is manifestly groundless, since the authors are trying to use the Covenant's communications procedure to raise a matter that has been adequately and impartially examined and resolved with full respect for judicial guarantees. The authors have repeatedly been granted access to justice and have obtained fully reasoned decisions in which the judicial bodies have replied in detail to their allegations. The State party contends that the matter raised by the authors relates exclusively to the evaluation of evidence for the purpose of establishing the date on which their father submitted a given application to the authorities and that it is not for the Committee to take the place of domestic judicial bodies. The State party recalls that the authors have failed to submit the original of the photocopy attested in January 1994 to either the domestic courts or the Committee.

4.2 In its observations of 27 May 2004, the State party contends that the Spanish courts have respected the principle of equality of arms throughout the proceedings. With regard to the documents provided by the authors, the State party specifies that:

(a) The authors have provided neither the domestic courts nor the Committee with the original of the alleged document dated 25 January 1985;

(b) It transpires from the documentation provided by the authors that the alleged document is an almost illegible photocopy, which carries a stamp of which only the date (25 January 1985) is legible, and which is printed on top of another that is indecipherable;

(c) The authors claim that an attested photocopy of the original, dated 4 September 1997, does exist. However, the only document provided by them is a cover letter dated 4 September 1997 written by the authors' father and addressed to the Directorate General of Personnel Costs and Public Pensions stating that the certified copy is enclosed; however, there is no sign of this copy in the documentation provided other than the reference to it in the cover letter;

(d) The words "attestation overleaf" appear in the lower right margin of the document to which the authors refer as the certified copy they found among their father's papers, but this formal attestation has never been made available to the State party;

(e) The document which the authors claim is dated 4 September 1997 was issued after the decision of the Directorate General of Personnel Costs and Public Pensions of the Ministry of Economic Affairs and Finance of 23 April 1997 granting the authors' father the right to receive a pension payable as of 1 February 1997;

(f) When, on 22 October 1998, the Central Economic and Administrative Court asked Mr. Lanzarote to provide the original application of 25 January 1985, he claimed that "he was unable to provide the original because the black leather briefcase containing the document and other documents had been stolen when he was robbed on 5 September 1997 at 10.30 p.m. in the town of Villalba". The first time Mr. Lanzarote was asked to provide the original application, he enclosed an alleged copy issued by an administrative body that had nothing to do with the issue under consideration (the land registry office) and not, as would have been appropriate, the original; the second time the same request was made, he enclosed a police statement reporting the theft of a briefcase, but the statement contained no information on the contents of the stolen item.

4.3 The State party notes that the matter raised by the authors relates to evidence; thus, the Committee should apply its repeatedly asserted principle that it is not for the Committee but for the relevant domestic courts to evaluate facts and evidence, unless their evaluation is manifestly arbitrary or amounts to a denial of justice. According to the State party, the communication constitutes an abuse of the right to submit communications and is incompatible with the provisions of the Covenant.

4.4 With regard to the alleged violation of the principle of equality of arms, the State party observes that the authors were repeatedly granted access to justice, and the competent domestic judicial bodies took action on their claim on numerous occasions. The domestic courts examined the documents provided by Mr. Lanzarote and the authors, including the certified copies of the alleged original document. The fact that their evaluation of the evidence did not support the authors' claims does not mean that it was not evaluated. The unreliability of the documents in question led not only the Directorate General of Personnel Costs but also the Central Economic and Administrative Court, the National High Court and the Constitutional Court to attach no weight to them and to find the negative attestations stating that there were no public records of the 1985 application more credible than the dubious photocopies submitted by the authors.

4.5 The State party considers that the authors' allegation that the second attested photocopy found among their father's papers was not taken into account is untrue. In the initial stages of the proceedings, an attested photocopy dated 4 September 1997 was submitted but was deemed insufficient by both the Directorate General of Personnel Costs and the Central Economic and Administrative Court. The authors subsequently submitted another attested photocopy of the alleged original document, this time dated 19 January 1994, to which the High Court accorded the same probative value as the previous copy. As the Constitutional Court pointed out during the *amparo* proceedings, this does not mean that the second document was not evaluated; it was merely deemed insufficient to outweigh the other evidence, according to which the only confirmed application was the one dated 7 January 1997. The fact that the National High Court's ruling does not expressly refer to the new document submitted by the authors (the 1994 copy), which they themselves say was identical to the first photocopy (of 1997), can by no means be construed as an omission amounting to a violation of the principle of equality of arms.

4.6 With respect to the authors' claim of manifest arbitrariness on the part of the National High Court, the State party maintains that the authors are confusing the right to access to justice and the right to submit legitimate evidence in their defence with obtaining a favourable decision from the domestic courts. The notion that the National High Court's evaluation of the evidence produced during the proceedings is arbitrary if it fails to yield the desired result is contrary to the very essence of the right to effective legal protection. The State party adds that using the Covenant to raise a matter that has been examined at length and resolved with due respect for all judicial guarantees constitutes an abuse of the right to submit communications.

4.7 In relation to the right to a hearing by a competent and impartial tribunal, the State party reiterates that it is not true that the Provincial High Court acted arbitrarily. The State party dismisses the authors' claim that the Constitutional Court failed to rule on the complaint relating to equality of arms. The Constitutional Court clearly decided that the High Court's evaluation of the evidence was in no way prejudicial to the authors and did not leave them defenceless, notwithstanding the fact that it was not in their favour. The State party is therefore of the view that the Constitutional Court clearly ruled on the right to equality of arms. The State party notes that the Constitutional Court's opinion that the authors presented their case in the *amparo* proceedings in a confusing manner can in no way be seen as tendentious or biased. With regard to the Constitutional Court's dismissal of the authors' petition for annulment, the State party explains that, contrary to the authors' claims, there is no provision for this type of petition in the domestic procedural legislation applicable to proceedings before the Constitutional Court.

4.8 With regard to the allegation that the Constitutional Court was partial because it included two judges against whom the authors' lawyer had previously filed a complaint in connection with another case, the State party makes the following observations: (i) the allegation of partiality made by the authors' representative concerns himself and not the authors; (ii) the action brought against the judges bears no relation to the authors' case; it was submitted by the authors' representative in relation to another case, where the Court had refused to change its decision to declare inadmissible an *amparo* application filed by the representative because he had failed to produce, despite being ordered to do so, a power of attorney that entitled him to take part in court proceedings; (iii) that complaint was rejected; (iv) the complaint against the judges and the decision to reject it predate the filing of the *amparo* application with the Constitutional Court; the authors' representative cannot claim he did not know which judges would be considering the *amparo* application, unless he knows absolutely nothing about the way in which State courts function and pays no attention to the notices sent to him by the office of the Constitutional Court; (v) the authors' representative is making these allegations for the first time before the Committee, never having made them before the domestic courts; (vi) after the *amparo* application was rejected, the authors' representative could have placed on record that he had been unaware of the court's composition, but he did not do so at any point. The State party contends that the impartiality of a court should be considered from both a subjective and an objective angle. As regards the subjective aspect, there is nothing to indicate that the composition of the Court might have been prejudicial to the authors' interests; any other conclusion would be tantamount to admitting that the identity of the authors' representative was of relevance to the court's decision, which has never been demonstrated. The State party points out that an objective evaluation of impartiality would require proof of certain facts that would justify questioning the Court's impartiality. In this connection, the State party notes that all the successive bodies that dealt with the matter rendered the same judgement on the key issue, namely the evaluation of the evidence, and that the Constitutional Court found them to have acted in accordance with the law. The State party concludes that there is no evidence to suggest that the Constitutional Court showed any partiality.

5.1 In their reply of 31 December 2004, the authors insist that the State party violated their right to equality of arms, because the domestic courts put the defendant, that is, the Administration, at an advantage by attributing probative value to the attestations it provided and refusing to attribute probative value to the attested photocopies, which under Spanish law have the same value as an original document. The authors cite Spanish case law, according to which attested photocopies have the same probative value as the original document, and article 8.3 of Royal Decree No. 772/1999, which was in force when the National High Court rendered its judgement, and which establishes that an attested photocopy has the same validity as the original document. They further mention that the validity of attested photocopies is recognized in the State party's administrative practice. The forging of an attested photocopy is an offence; therefore, if the High Court had any doubts about the authenticity of the two attested photocopies, it should have suspended its consideration of the case and referred it to a criminal court. The High Court was not competent to declare a document that by law is considered official as invalid. In its decision, the Constitutional Court also failed to mention that they were official documents and misrepresented them as private documents that the court was free to evaluate. The authors add that, on 23 July 1997, the Ministry of Economic Affairs and Finance requested submission of the original document or a duly attested photocopy of the application of 25 January 1985. Thus, the administrative body itself acknowledged that a certified copy has the same value as an original.

5.2 The authors claim that the State party's comments on the documents they provided (see paragraph 4.2 above) are inaccurate. For example, the State party states that the stamp on the attested photocopy of the original document is virtually illegible, whereas, according to the authors, the High Court found it to be legible. The photocopy attested in January 1994 was issued by the Directorate General of Land Registries, which is attached to the Ministry of Economic Affairs and Finance, and not, as the State party claims, "an administrative body that has nothing to do with the issue under consideration".

5.3 The authors insist that the National High Court omitted to mention the attested photocopy issued by the Directorate General of Land Registries on 9 January 1994, which the authors' representative submitted during the final stages of the proceedings as an unexpected finding of crucial relevance to the case. The authors view this omission as a violation of their right to due process.

5.4 The authors stress that the High Court's refusal to recognize the official nature of the two attested photocopies, considering them as simply private documents, is manifestly arbitrary and amounts to a denial of justice, in violation of article 14, paragraph 1, of the Covenant. Furthermore, the judges' power to evaluate the documents is subject to formal limitations, which were overstepped in the present case.

5.5 The authors state that the High Court's refusal to acknowledge the probative value of the two attested photocopies violates the right to be heard by a competent and impartial tribunal; the High Court should have been aware that it is not within its competence to rule on the alleged forgery of official documents, which is a matter for the criminal courts.

5.6 The authors state that they first became aware of the identity of the three members of the Constitutional Court chamber that ruled on the *amparo* application when they were notified that the application has been rejected. The authors' lawyer had previously filed a complaint against these three judges in the context of a criminal trial for defamation, after they had made allegedly defamatory accusations against him when ruling on an *amparo* application filed in connection with a case other than the authors'. The complaint of defamation was handled in accordance with established procedure. The parties were summoned to conciliation proceedings; the judges appeared before a conciliation court and were represented by a State advocate. The judges had reported the authors' lawyer to the bar association, which decided not to institute disciplinary proceedings against him. Although no formal complaint was filed against the judges, a criminal action had been brought against them and in spite of this they participated in the Constitutional Court's decision to reject the authors' *amparo* application. The authors state that the Constitutional Court has ruled in an earlier case that when there is enmity between a lawyer and the judge the judge is not obliged to withdraw from the case; rather, the interested party represented by the lawyer decides whether or not to change counsel. The authors claim that the Constitutional Court never informed them of the identity of the members of the Court who would be hearing the *amparo* application. They further claim that certain expressions used in the ruling on the *amparo* application, like the one describing it as confusing, are evidence of the judges' partiality. As further evidence of the Constitutional Court's partiality, the authors add that in one case the Supreme Court had allowed a civil-liability claim against 11 of the 12 Constitutional Court judges for handing down a manifestly unlawful judgement; the judges in question had filed an *amparo* application against the decision to the Constitutional Court -in other words to themselves. The authors add that the Constitutional Court rejects around 97 per cent of *amparo* applications without examining the merits of the case, and that that it ignores the Committee's Views on complaints lodged against the State party in relation to article 14, paragraph 5, of the Covenant.

Issues and proceedings before the Committee

Consideration of admissibility

6.1 Before considering any allegations contained in a communication, the Human Rights Committee must, in accordance with rule 93 of its rules of procedure, decide whether or not the communication is admissible under the Optional Protocol to the International Covenant on Civil and Political Rights.

6.2 The Committee has ascertained that the same matter is not being examined under another procedure of international investigation or settlement, in accordance with article 5, paragraph 2 (a), of the Optional Protocol.

6.3 The Committee considers that the allegation regarding the failure to accord probative value to the two attested photocopies refers in essence to the evaluation of the facts and evidence by the Spanish courts. The Committee recalls its jurisprudence in this respect and reiterates that, generally speaking, it is for the relevant domestic courts to review or evaluate facts and evidence, unless their evaluation is manifestly arbitrary or amounts to a denial of justice. The Committee notes that, in its dismissal of the authors' petition for annulment, the National High Court expressly stated that it had evaluated and rejected the probative value of the attested photocopy of 19 January 1994 and that the Constitutional Court rejected the appeal for prorogation of the *amparo* application relating to the petition for annulment. It further observes that the

Constitutional Court found that the High Court had indeed evaluated the document provided by the authors and that the Court's evaluation of the evidence was not prejudicial to the authors and did not leave them without a defence. The Committee is therefore of the view that the authors have not sufficiently substantiated their claim that there was arbitrariness or a denial of justice in the present case. It thus considers that the part of the communication relating to the alleged violation of the principle of equality of arms and the alleged arbitrariness of the National High Court's ruling should be declared inadmissible under article 2 of the Optional Protocol.

6.4 With regard to the complaint relating to the alleged lack of impartiality on the part of the Constitutional Court, the Committee notes that in April 2000 the Second Chamber of the Constitutional Court dismissed an appeal lodged by the authors' lawyer in relation to another case in which the *amparo* application filed by the lawyer had been rejected because he did not meet the legal requirements to be appointed as an attorney before the court. The Chamber stated that the lawyer, through his conduct, had deliberately caused prejudice to the rights of the individual who had entrusted the lawyer with his defence and ordered that a copy of the record of the proceedings be submitted to the Murcia bar association for it to examine the professional conduct of the authors' lawyer. The Committee also takes note of the authors' argument that, although their lawyer brought a criminal action against the judges of the Second Chamber for allegedly defamatory statements, the action was discontinued. The Committee considers that the authors have not sufficiently substantiated, for the purposes of admissibility of the communication, their claim that the decision taken by the judges of the Second Chamber and the circumstances that led to a criminal complaint that was discontinued had affected the Court's impartiality in its decision on the authors' *amparo* application and appeal for prorogation. The Committee concludes that this part of the complaint is inadmissible under article 2 of the Optional Protocol.

7. The Committee therefore decides:

(a) That the communication is inadmissible under article 2 of the Optional Protocol;

(b) That the present decision should be communicated to the State party and the authors of the communication.

[Adopted in English, French and Spanish, the Spanish text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the Committee's annual report to the General Assembly.]

Q. Communication No. 1228/2003, *Lemercier v. France* (Decision adopted on 27 March 2006, eighty-sixth session)*

Submitted by:	Michel Lemercier, deceased, and his son Jérôme Lemercier (represented by counsel)
Alleged victim:	Michel Lemercier
State party:	France
Date of communication:	15 April 2003 (initial submission)
Subject matter:	Length of prison sentence
Procedural issues:	State party reservation
Substantive issues:	Non-retroactivity of criminal law
Articles of the Covenant:	15 (1)
Articles of the Optional Protocol:	2; 5, paragraph 2 (a)

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 27 March 2006,

Adopts the following:

Decision on admissibility

1. The original author of the communication, dated 15 April 2003, was Michel Lemercier, a French national. This person died on 8 May 2004, but his son, Jérôme Lemercier, said he wished to maintain the communication. The author claimed to be the victim of a violation by France of article 15, paragraph 1, of the International Covenant on Civil and Political Rights. He is represented by counsel. The Optional Protocol entered into force for France on 17 May 1984.

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* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Nisuke Ando, Mr. Prafullachandra Natwarlal Bhagwati, Mr. Maurice Glèlè Ahanhanzo, Mr. Edwin Johnson, Mr. Walter Kälin, Mr. Ahmed Tawfik Khalil, Mr. Rajsoomer Lallah, Mr. Michael O'Flaherty, Ms. Elisabeth Palm, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Ivan Shearer, Mr. Hipólito Solari-Yrigoyen and Mr. Roman Wieruszewski.

Pursuant to rule 90 of the Committee's rules of procedure, Ms. Christine Chanet did not participate in the examination of this communication.

Factual background

2.1 On 23 February 1996, the Rhône Assize Court found the author guilty of robbery and attempted armed robbery, committed as part of an organized gang, with violence, of the restraint and detainment of persons and of various related offences, committed between 1985 and 1990. The court sentenced him to rigorous imprisonment for life, subject to an 18-year period of unconditional detention.

2.2 On 26 February 1996, the author lodged an appeal on a point of law. In a decision of 5 February 1997, the Criminal Division of the Court of Cassation quashed the sentence of life imprisonment on the grounds that it was "legally unfounded". Article 112-1 of the new Criminal Code (which came into effect on 1 March 1994) provides that:

> The new provisions shall apply to offences committed prior to their entry into force and not yet subject to a final sentence where they are less severe than the earlier provisions.
>
> The Court of Cassation considered that the author had been sentenced by the Rhône Assize Court to life imprisonment for offences of robbery preceded, accompanied or followed by acts of violence causing death on the basis of article 311-10 of the new Criminal Code. This penalty was heavier, however, than that provided for by article 384 of the former Criminal Code, under which the sentence was 10 to 20 years' rigorous imprisonment. On the other hand, the Court of Cassation recalled that the author had also been found guilty of armed robbery and, in view of the aggravating circumstance of "an offence committed as part of an organized gang", sentenced the author to 30 years' rigorous imprisonment, in accordance with article 311-9 of the new Criminal Code.

2.3 On 28 May 1999, the author lodged a complaint with the Public Prosecutor at the Appeal Court of Lyon seeking to reduce the maximum penalty applicable under the former Criminal Code in force at the time of the events to 20 years instead of 30. In a decision of 14 December 1999, the Indictments Chamber of the Appeal Court of Lyon found the complaint inadmissible, on the grounds that it sought a substantive review of the sentencing decision taken by the Assize Court given in the two aforementioned rulings of 23 February 1996 and 5 February 1997.

2.4 The author lodged two appeals against the decision of the Indictments Chamber of the Court of Appeal of Lyon, dated 17 and 31 December 1999 respectively. On 26 September 2000, delivering its ruling on the author's appeals, the Criminal Division of the Court of Cassation dismissed the first appeal on the grounds that the Court of Cassation's decision of 5 February 1997 showed no factual error. It found the second appeal inadmissible on the grounds that the author had exhausted his right to appeal against the impugned decision by lodging his first appeal.

2.5 The author filed a complaint with the European Court of Human Rights, which declared it inadmissible on 24 June 2002 on the grounds that it was time-barred.

2.6 On 28 August 2003, the author filed a further petition with the Investigation Chamber of the Court of Appeal of Riom, seeking rectification of the factual error contained in the Assize Court's ruling. By decision of 17 February 2004, the Investigation Chamber of the Court of Appeal of Riom decided that there were no grounds for reducing the period of unconditional imprisonment and that it was not competent to give a ruling on the request for rectification of a factual error.

The complaint

3. The author contends that the purpose of his appeals was to challenge not the facts or the penalty applied to him, but the length of the sentence legally applicable at the time of the facts, namely 20 years of rigorous imprisonment in accordance with the former article 384 of the Criminal Code. He argues that the sentence of 30 years of rigorous imprisonment passed by the Court of Cassation pursuant to article 311-9 of the new Criminal Code is legally unfounded on the grounds that aggravating circumstances were not mentioned in the committal order of 16 May 1995 and could therefore not be raised at the hearing before the Assize Court. He contends that he was the victim of a breach of article 15 (1) of the Covenant.

The State party's observations on admissibility and the merits of the communication

4.1 In a note verbale of 28 January 2004, the State party disputes the admissibility of the communication. It recalls that a reservation has been made to article 5, paragraph 2 (a), of the Optional Protocol, specifying that the Committee shall not have competence to consider a communication from an individual if the same matter is being examined or has already been considered under another procedure of international investigation or settlement. It notes further that the case has already come before the European Court of Human Rights and concludes that it can therefore no longer be considered by the Committee, in accordance with the Committee's own case law.[1]

4.2 The State party submits that the said reservation is fully applicable in this case and that considering it inapplicable for the reason that the case was found inadmissible by the European Court of Human Rights for exceeding the six-month time limit would be tantamount to restricting the reservation exclusively to cases which have been considered on the merits. It recalls that the reservation mentions only "examination" of the case and not examination "on the merits". It concludes that the only reasonable interpretation that can be given to the notion of "examination" of the case within the meaning of the reservation is any examination.

4.3 In a note verbale of 27 May 2004, the State party again disputes the admissibility of the communication. It argues firstly that the complaint has no more cause of action since the author is deceased. Secondly, it still considers the petition inadmissible on the grounds that it has already been examined by another international body.[2] Lastly it argues that the petition is also inadmissible because it was submitted to the Committee before domestic remedies had been exhausted. It notes that the author appealed to the Investigation Chamber of the Court of Appeal of Riom for rectification of factual error and release. As this petition was dismissed by the decision of 17 February 2004, the State party considers that the author had the possibility of appealing against that decision on a point of law and thus that the domestic remedies were not exhausted when the matter was first brought before the Committee.

4.4 Regarding the merits of the communication, the State party rejects any violation of article 15 (1). It points out in the first place that the principles governing the application over time of substantive criminal law, which incriminates acts and establishes the corresponding penalties, meet the objectives of that provision where French law is concerned. It recalls that in French criminal law the general principle is that new legislation applies to all offences committed after its entry into force. It points out, however, that the non-retroactivity of the criminal law applies only in cases where the new legislation is more severe, and that if the new legislation is more favourable to the offender (either because the penalty imposed by the new law is more lenient or because the offence has been abolished), it will apply even to offences committed prior to its entry into force. These principles are enshrined in the case law of the Constitutional Council (decision 80-127 DC of 19-20 January 1981) and expressly confirmed in article 112-1 of the new Criminal Code. The State party concludes, therefore, that the principles in French law governing the application over time of substantive criminal law meet the requirements of article 15, paragraph 1.

4.5 Secondly, the State party contends that there was no violation of article 15, paragraph 1, in the present case. It considers that the sentence passed on the author complied with the laws applicable to the offences with which he was charged. It recalls that the author was found guilty, on 23 February 1996, by the Rhône Assize Court, of the offences of robbery and attempted armed robbery, committed as part of an organized gang, with violence - on one occasion leading to the death of two victims - of aggravated handling of stolen goods, of unlawful restraint and detainment of persons and of armed violence, all committed between 1985 and 1990. It recalls that in the event of multiple offences, the heaviest sentence may be passed under the terms of article 132-3 of the new Criminal Code. It thus concludes that, according to the new Criminal Code, the author was indeed liable to the heaviest penalty of 30 years of rigorous imprisonment, since the offence of detainment for criminal purposes, formerly punishable by rigorous imprisonment for life, is now punishable with 30 years of rigorous imprisonment. According to the State party, the Court of Cassation correctly applied the rules of retroactivity of the more lenient criminal legislation and accumulated sentences by subjecting the author to 30 years of rigorous imprisonment. It points out that in claiming that he should have received the prescribed sentence of 10 to 20 years' rigorous imprisonment, the author fails to mention that the Assize Court also found him guilty of detainment for the purpose of facilitating armed robbery as part of an organized gang. Thus the author's complaint really amounts to challenging the fact that he was given the heaviest sentence (30 years) provided for one of the offences for which he was found guilty, as the competent court was allowed to rule under article 132-3 of the new Criminal Code. The State party therefore considers that the communication should in any case be rejected as unfounded.

The author's comments on the State party's observations

5.1 In his comments of 6 October 2004, the author's son notes that by letter dated 15 June 2004 he expressly authorized counsel to continue the procedure. Regarding the State party's argument that domestic remedies were not exhausted, the author's son recalls that his father was sentenced by final judgement of the Assize Court, after which he appealed to the Director of the Riom Detention Centre, then to the Investigation Chamber of the Appeal Court of Riom, which rejected his appeal on 17 February 2004. He considers therefore that his father sufficiently drew the attention of the public authorities to his situation. As for the State party's argument that since the communication was found inadmissible by the European Court of Human Rights, it should also be found inadmissible by the Committee because it had already been examined, the author's son points out that the complaint was previously found inadmissible by the European Court of Human Rights on the grounds that the author had filed it after the expiry of the six-month time limit. Since the complaint was dismissed without even summary consideration of the facts by the European Court of Human Rights, the latter's ruling of inadmissibility cannot be considered to be an examination within the meaning of the Protocol, so that the communication is perfectly admissible.

5.2 On the merits, the author's son reiterates that the Court of Cassation could not hold against his father the aggravating circumstance of offences committed as part of an organized gang insofar as the former Criminal Code made no provision for that aggravating circumstance, which was introduced under the new Criminal Code (art. 224-3), in other words after the events. He also reiterates that aggravating circumstances could not legally be held against the author insofar as such circumstances were not mentioned in the committal order and could therefore not be raised before the Assize Court. Consequently, the applicable penalty should be limited to 20 years' imprisonment and not 30 as decided by the Court of Cassation, so that there was clearly a violation of article 15, paragraph 1.

Issues and proceedings before the Committee

6.1 Before considering any claim contained in a communication, the Human Rights Committee must decide, in accordance with rule 93 of its rules of procedure, whether the claim is admissible under the Optional Protocol to the Covenant.

6.2 Regarding the author's demise, the Committee recalls that the author's descendants may decide to continue the communication after the author's death.[3] It notes that the author's son clearly expressed a wish to continue the procedure before the Committee and supplied proof that he was the author's descendant. The Committee observes that while it may revisit the question of which claims formulated by a complainant survive his or her death, there is nothing in the present case that would prevent the Committee from considering the admissibility of the claim.

6.3 In accordance with article 5, paragraph 2 (a), of the Optional Protocol, the Committee has ascertained that a similar complaint filed by the author had been found inadmissible on the grounds that it was time-barred by the European Court of Human Rights on 24 June 2002 (complaint No. 51051/99). It also recalls that at the time it subscribed to the Optional Protocol the State party entered a reservation to article 5, paragraph 2 (a), of that Protocol specifying that the Committee "shall not have competence to consider a communication from an individual if the same matter is being examined or has already been considered under another procedure of international investigation or settlement". It takes note of the State party's argument whereby the notion of "examination" of the matter in the meaning of the reservation signifies any examination. This interpretation of the notion of an "examination" of the case is not shared by the Committee, however, since it would be tantamount to applying the State party's reservation to any communication referred to the European Court of Human Rights and receiving a response of any kind whatever. The Committee considers that the European Court of Human Rights did not examine the case in the meaning of article 5, paragraph 2 (a), insofar as its decision concerned only a procedural issue.[4] Therefore, no impediment arises with regard to article 5, paragraph 2 (a), of the Optional Protocol as modified by the State party's reservation.

6.4 With regard to the exhaustion of domestic remedies, the Committee has noted the State party's arguments whereby the author had not exhausted domestic remedies at the time the matter was brought before the Committee and that he subsequently continued to avail himself of domestic remedies which were not yet exhausted. It recalls its normal practice, however, according to which the issue of the exhaustion of domestic remedies is decided at the time it is considered by the Committee, save in exceptional circumstances,[5] which do not apply in this case. It notes that the author made all reasonable attempts to challenge the length of his prison sentence, including before the Criminal Division of the Court of Cassation. The Committee therefore considers that domestic remedies have been exhausted.

6.5 With regard to the complaint of a violation of article 15, paragraph 1, the Committee shares the State party's arguments that the sentence received by the author was not more severe than that which was applicable, at the time of the events, to the acts constituting the offences for which the author was sentenced. It therefore considers that the author has not substantiated his complaint for the purposes of admissibility, and that this claim is inadmissible under article 2 of the Optional Protocol.

7. The Committee therefore decides:

(a) That the communication is inadmissible under article 2 of the Optional Protocol;

(b) That this decision shall be communicated to the State party and to the author's son.

[Adopted in English, French and Spanish, the French text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the Committee's annual report to the General Assembly.]

Notes

[1] See *A.M. v. Denmark*, communication No. 121/1982, Views adopted on 23 July 1982, para. 6.

[2] See *V.E.M. v. Spain*, communication No. 467/1991, Views adopted on 16 July 1993, para. 5.2; see also *Trébutien v. France*, communication No. 421/1990, Views adopted on 18 July 1994, para. 6.3.

[3] See *Croes v. Netherlands*, communication No. 164/1984, decision of inadmissibility adopted on 7 November 1988; and *Brok v. Czech Republic*, communication No. 774/1997, Views adopted on 31 October 2001.

[4] See *Bertelli Gálvez v. Spain*, communication No. 1389/2005, decision of inadmissibility adopted on 25 July 2005, para. 4.3; and *O.F. v. Norway*, communication No. 158/1983, Views adopted on 26 October 1984, para. 5.2.

[5] See *Baroy v. Philippines*, communication No. 1045/2002, Views adopted on 31 October 2003, para. 8.3; and *Bakhtiyari v. Australia*, communication No. 1069/2002, Views adopted on 29 October 2003, para. 8.2.

R. Communication No. 1229/2003, *Dumont de Chassart v. Italy* (Decision adopted on 25 July 2006, eighty-seventh session)*

Submitted by:	Noel Léopold Dumont de Chassart (represented by counsel, the Studio Legale Associato de Montis, at the time of the initial submission)
Alleged victim:	Noel Léopold Dumont de Chassart
State party:	Italy
Date of communication:	25 March 2003 (initial submission)
Subject matter:	Right to protection of the family by the State
Procedural issues:	Lack of substantiation; article 1 of the Optional Protocol; article 3 of the Optional Protocol
Substantive issues:	Effective remedy; arbitrary or unlawful interference with privacy, family and home; right to protection of the family by the State; steps taken to guarantee requisite protection of children
Articles of the Covenant:	2, paragraphs 1 and 3 (a) and (c); 17; 23, paragraphs 1 and 4; 24, paragraph 1
Articles of the Optional Protocol:	1, 2 and 3

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 25 July 2006,

Adopts the following:

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* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Nisuke Ando, Mr. Prafullachandra Natwarlal Bhagwati, Mr. Maurice Glèlè Ahanhanzo, Mr. Edwin Johnson, Mr. Walter Kälin, Mr. Ahmed Tawfik Khalil, Mr. Rajsoomer Lallah, Mr. Michael O'Flaherty, Ms. Elisabeth Palm, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Ivan Shearer, Mr. Hipólito Solari-Yrigoyen and Mr. Roman Wieruszewski.

An individual opinion signed by Committee member Mr. Rafael Rivas Posada is appended to the present document.

Decision on admissibility

1. The author is Mr. Noel Léopold Dumont de Chassart, a Belgian citizen born in Uccle, Belgium, on 20 June 1942, and currently residing in Italy. He claims to have been a victim of violations by Italy of articles 2, paragraphs 1 and 3 (a) and (c), 17, 23, paragraphs 1 and 4, and 24, paragraph 1, of the International Covenant on Civil and Political Rights. At the time of the initial submission, the author was represented by the Studio Legale Associato de Montis, in Cagliari, Italy. The Covenant and the Optional Protocol entered into force for Italy on 30 April 1976 and 15 September 1978, respectively.

The facts as presented

2.1 On 27 October 1998, the author's wife, of Austrian origin, applied to the Italian courts at their place of residence for a separation from her husband. On 2 March 1999, the Civil Court of Cagliari granted the separation, temporarily assigned custody of the couple's three children to the mother and set out provisions governing the author's right of access and custody. The ruling also bound the two parents to take any decision of major concern to the children in a consensual manner. According to the author and the State party, this was equivalent to a ban on leaving Italian territory while the procedure continued. On 25 March 1999, the author lodged an appeal in the above-mentioned Court, complaining of the considerable difficulties he was experiencing in maintaining a relationship with his children, owing to the mother's "obstructionist behaviour". On 9 June 1999, the mother left Italy for Austria with the three children, aged 11, 8 and 5; according to the author, this took place in spite of his request to the local police to intervene. On 6 August 1999, the examining magistrate amended the interim arrangements for the custody of the children and entrusted them to the author, while ordering the immediate return of the children to Italy. He noted that the mother had violated the Court's ruling of 2 March 1999, particularly as regards the parents' duty to take decisions of major concern to the children in a consensual manner, which was not done in connection with a medical operation on one of the children and the transfer of the other children abroad. According to the author, the Court suggested that he should allow a reasonable period for the order to be complied with. Between 3 and 12 August 1999, the mother reportedly returned to the author's home and ransacked it. The author indicates that the police took no action in this regard, and rejected a report of burglary.

2.2 On 2 November 1999, considering that the reasonable period had elapsed, the Civil Court of Cagliari confirmed the decision to give the author custody of the children, granting him the effective exercise of parental authority. The Court reaffirmed that the children should be returned to Italy immediately and ruled that the mother of the children had violated article 574 of the Criminal Code on the abduction of minors. On the basis of the court decision, the author lodged with the Italian Central Authority - on 24 September 1999 according to the author and on 22 November 1999 according to the State party - an application for the return of the three children by Austria, in accordance with the Hague Convention of 25 October 1980. On 21 January 2000, the Langenlois District Court in Austria rejected the application for their return on the basis of articles 3,[1] 5[2] and 13[3] of the Hague Convention: (a) the mother was the sole guardian of the children at the time of the alleged abduction; (b) the three minors were opposed to returning to Italy; and (c) the eldest of the three children might have suffered physical harm on returning to Italy, since he was undergoing treatment in Austria in a specialist institution. The court's decision to refuse the application was upheld by the Krems/Donau Court of Appeal in Austria on 4 April 2000 and by the Austrian Court of Cassation on 29 May 2000.

Subsequently, the author lodged a further application with the Italian Central Authority seeking action by the Austrian judicial authorities to regulate his right of access, in accordance with the procedure laid down in the Hague Convention. The application was accepted, and the Austrian courts recognized the author's right of access on 11 October 2000.

2.3 Meanwhile, in February 2000, the Cagliari Juvenile Court shelved the case on the grounds that, as the children were no longer on Italian soil, the matter was no longer within its jurisdiction. In May 2000, the Italian Central Authority lodged a request for enforcement and the restoration of custody, in accordance with the Luxembourg Convention of 20 May 1980. The request was rejected by Austria in June 2000. Finally, on 17 October 2000, the Italian Court granted the separation of the spouses and confirmed its earlier rulings. On 5 December 2000, the Court initiated criminal proceedings against the mother on charges of abduction. On 30 March 2001, the Cagliari Court of Appeal (civil division) denied the mother's appeal against the ruling of 17 October 2000, inter alia because it was lodged after the legal deadline.

2.4 The author indicates that on 3 September 2001 he began an extensive correspondence with the President of Italy, the Prime Minister, the President of the Senate, the Constitutional Court and all the ministers concerned - the Ministers of Justice, the Interior, Foreign Affairs, Finance, etc. - as well as with the Italian Human Rights League and the Chairman of the special human rights commission. On 20 April 2001, the President of Italy stated that he had no authority in the matter. In December 2002 and on 20 March 2003, respectively, the Minister of Justice and the Minister for Foreign Affairs shelved the case, on the grounds that the decisions of the Austrian courts were final. The author indicates that at the beginning of 2002 he also lodged an appeal with the European Ombudsman, who asked a question in the European Parliament concerning the recognition and enforcement of judicial decisions relating to the custody of children. Lastly, a request for an investigation addressed to the Italian Constitutional Court went unanswered. The author points out that, at the end of four years of applications and court hearings, which have all produced no result or no significant result, the only possible remedy lies with the Committee, as domestic remedies are ineffective and unreasonably prolonged in the meaning of article 5, paragraph 2 (b), of the Optional Protocol.

2.5 The author indicates that the refusal of the Austrian authorities to return the children was the subject of an application to the European Court of Human Rights in respect of Austria (No. 63933/00 of 2 June 2000). This application was declared inadmissible on 23 January 2004, on the grounds that no apparent violation of the rights and freedoms guaranteed under the European Convention on Human Rights and the Protocols thereto had been identified.

The complaint

3.1 The author points out that the State party did not ensure proper follow-up to the decisions of the Italian courts, and violated articles 2, paragraphs 1 and 3 (a) and (c), 17, 23, paragraphs 1 and 4, and 24, paragraph 1, of the Covenant.

3.2 The author maintains that the allegation concerning a violation of article 2, paragraph 3 (c), arises from the total failure of the local police authority to protect the children on the day of the abduction. The violation was all the more serious since the appeals to the ministers concerned produced no response and no action. Moreover, the complete absence of cooperation on the part of the competent authorities (the Ministry of Juvenile Justice and the Central Authority) in order to ensure proper follow-up to the decisions of the courts gave rise to a violation. In the author's view, this violation was all the more serious since the appeal to the Ministry of Justice was fruitless, the information that had been communicated to him by its staff being incomplete and biased. The decision of various offices in the Ministry of Justice to shelve the children's case was also a violation of that article.

3.3 Concerning the violation of article 2, paragraph 1, of the Covenant, the author states that the fact that he is not an Italian citizen suggests a violation of the right to respect for the individual on the grounds of his national origin. However, according to the author, there are no elements which would enable him to claim a violation of this article, aside from the refusal to allow consular visits to the abducted children, as planned by the Ministry of Foreign Affairs.

3.4 Concerning the violation of article 2, paragraph 3 (a), of the Covenant, the author claims that the refusal by the Minister of Defence to intervene (through the Ministry of the Interior) in connection with the offences committed by the local police at the time of the abduction constitutes a violation of this article. The violation was said to be more serious owing to the lack of a report on the intervention.

3.5 Concerning the violation of article 17, paragraph 1, of the Covenant, the author maintains that the police's refusal to intervene when his home was burgled (according to the author, the police were called in and were present at the scene) by the mother between 3 and 12 August 1999 constituted arbitrary interference with the author's privacy and his home. In addition, the courts' refusal to acknowledge the unlawful nature of this interference constitutes a violation of article 17, paragraph 2, of the Covenant.

3.6 Concerning the violation of article 23 of the Covenant, the author points out that the State party failed to protect his family (art. 23, para. 1) in all the above-mentioned situations and when the marriage was being dissolved. Steps to provide the children with the necessary protection were not taken either in order to prevent their abduction or during the international procedures to secure their return (art. 23, para. 2).

3.7 Concerning the violation of article 24, paragraph 1, of the Covenant, the author maintains that the State party did not assure the measures of protection required under the article, by refusing to send a communication to the Committee concerning Austria's many violations of the United Nations Convention on the Rights of the Child of 20 November 1989, and refusing to intervene in the procedure initiated in the European Court of Human Rights.

The State party's observations on the communication

4.1 In a note verbale dated 24 May 2004, the State party indicates that the allegation of a violation of article 2, paragraph 1, of the Covenant, has no legal basis whatsoever, as the author's many judicial and administrative initiatives against Austria received the necessary administrative and judicial support, in keeping with the provisions of the international conventions to which Italy is a party. In particular, the State party indicates that, following the application lodged by the author with the Italian Central Authority, the Austrian judicial authorities acknowledged the author's right of access to the children, and drew up a programme of visits. The author had forgone his visits owing to professional commitments which could not be rescheduled, and felt that he "could not agree to a right of access which was subject to strict surveillance and unpredictable timings".

4.2 The State party presents the facts and indicates that the Court had provisionally awarded custody of the children to the mother with the injunction that she was not to remove them from Italy, and regulating the author's right of access and custody. However, in an appeal lodged on 25 March 1999, the author complained of the considerable difficulties he was experiencing in maintaining a good relationship with his children owing to his wife's alleged obstructionist behaviour, and on 11 June 1999 he indicated that his wife had settled in Austria, having taken the minor children with her without his consent. Moreover, the State party explains that on 23 November 2000 the Italian Central Authority shelved the case because the request had been dealt with by means of the steps taken with regard to the author's right of access in Austria. However, on 23 May 2000, the author decided to lodge a new application, this time under the Luxembourg Convention of 20 May 1980, seeking the recognition and enforcement of the Cagliari Court's ruling of 2 November 1999 in the Austrian system. This request was duly forwarded to the Austrian Central Authority, despite the fact that the deadline of six months from the date of the abduction, laid down in article 8 of the Luxembourg Convention, had passed. The request was denied on 27 June 2000 on the basis of articles 8, 9 and 10 of the Convention, since (a) the request had been submitted late; (b) if the request had been accepted, the children's return to Italy would have been against their interests, in view of the time that they had spent in Austria; and (c) accepting the request would have been inconsistent with the Krems/Donau Court of Appeal decision of 4 April 2000. For those reasons, the case was shelved by the two central authorities. The State party indicates that, on 23 November 2000, the author forwarded the Cagliari Court's ruling of 17 October 2000 to the Italian Central Authority for the purpose of securing its recognition by Austria. The State party explains that the ruling of 17 October 2000 merely confirmed the ruling of 2 November 1999, to which the Austrian courts had already responded negatively.

4.3 The State party explains that on several occasions it advised the author to agree to the terms of access proposed by the Austrian authorities, and that it requested the International Social Service to provide the author with full assistance in facilitating the visits. However, the International Social Service informed the State party that a meeting with the author had had a basically negative outcome, as he was concerned only with the refusal of his requests for the restoration of custody. Similarly, a meeting on 30 January 2001 between the author and the official of the Italian Central Authority dealing with the case produced no result. It was only on 11 June 2001, at the formal request of the two central authorities, that the author lodged with the Italian Central Authority an application for the recognition of his right of access over the entire school year. However, although the application was forwarded to the Langenlois District Court in Austria by the Austrian Central Authority on 19 June 2001, the Court took no action.

4.4 Concerning the claim that the authorities of the State party did not protect the children from probable abduction by their mother, the State party emphasizes that the Ministry of the Interior and the border police had taken all the customary measures in this type of case, bearing in mind that travel between Italy and Austria is now governed by the Schengen Treaty. This convention provides for the abolition of borders, and therefore no specific action, apart from the activities that are normally carried out, could have been taken at the border in connection with a ban on leaving the country. The State party emphasizes that the Cagliari Court's ruling, while prohibiting the removal of the minors from the country, did not instruct the border police to conduct checks on the border, and therefore such checks continued to be subject to the

Schengen Treaty. In addition, the Court's ruling contained no provision for continuous police monitoring of the movements of the mother and the children. Hence there are no grounds for any charge of negligence against the State party.

The author's comments

5.1 In his comments of 20 November 2004, the author reiterates that he received no administrative or legal support from the State party in relation to the return of his children. He points out that the State party should have complied with its obligations regarding cooperation set out in The Hague and Luxembourg conventions. Concerning the visits which had been organized in Austria, he explains that, in the case of the first visit, which was scheduled to take place from 16 to 23 April 2000, the Court's decision had in the meantime been suspended, since the mother had appealed against that decision. The author was informed of the second visit (from 28 July to 6 August 2000) by fax from the Italian Central Authority on 14 August 2000. He was informed by fax of the third visit on the same day, whereas it was supposed to take place from 12 to 19 August. Even if he had been able to find a flight, he would not have been able to see his children because the mother had appealed against the decision on 11 August. Lastly, the author acknowledges that he refused his right of access from 26 December 2000 to 1 January 2001 because the conditions imposed were "inhuman" and he had no assurance that he would see his children, as the terms of access were set non-negotiably by the mother.

5.2 The author points out that the State party should have opposed Austria's decisions regarding the application of the Luxembourg Convention (see paragraph 4.2). First, it is not true that the deadline had passed since, according to the author, the period had begun on 21 December 1999, when the mother had indicated that she was going to return the children to the author. Secondly, as far as the children's interests were concerned, the author refers to the decisions of the Italian courts, which indicate that it was the abduction and the mother's behaviour which were the source of major risks. Lastly, it was in fact the Austrian decisions which ran counter to the Italian decisions. The author adds that he received no help from the International Social Service, which said that it had no competence to assist, but acknowledges having said that he did not wish to agree to the right of access on just any terms. He refers to the report prepared by the Austrian social service, which considered that seven days' access per year was in keeping with article 9, paragraph 3, of the Convention on the Rights of the Child.

5.3 In response to the State party's argument concerning the Schengen Treaty, the author points out that the Treaty did not abolish the obligations imposed by the Convention on the Rights of the Child or the fundamental principles of the Universal Declaration that relate to the duty to protect children. The author emphasizes that the State party does not indicate that, on 9 June 1999, he contacted the police in order to prevent the children from leaving, and points out that the Court was opposed to their departure. In contrast to the assertions of the State party, the author claims that all the competent Italian authorities, including the police, have a duty to enforce the decisions of the courts, and that the departure of the children violated his right of access and conflicted with the mother's obligation to appear before the Court a few days later. Lastly, the author points out that, under the Schengen Treaty, the authorities of a State member of the European Union have the right to take action against persons responsible for abductions beyond national frontiers whereas, as far as he knew, there had been no contacts between the Italian and Austrian authorities.

5.4 Concerning article 2, paragraph 3 (a), of the Covenant, the author indicates that the negligence of the Italian police, which made possible the abduction of his children, had never been acknowledged by the ministries concerned, thus denying him any recourse. Concerning article 2, paragraph 3 (b), of the Covenant, the author indicates that the Government did nothing to follow up the decisions of the Italian courts. Concerning article 23, paragraph 4, of the Covenant, the author expresses surprise that the provisions of the Schengen Treaty should be sufficient to nullify international rules for the protection of minors. Lastly, concerning article 24, paragraph 1, the author maintains that the indifference of the Italian Government stemmed from his Belgian nationality and that of the children. The author points out that, on 7 June 2004, several hundred victims of child abductions had demonstrated in front of the Ministry of Foreign Affairs in Rome to protest against the Italian Government's inertia in the face of over 600 abductions of children, which made a laughing stock of Italian court decisions on child custody and violated article 2, paragraph 3, of the Covenant.

Additional observations by the State party concerning the author's comments

6.1 On 14 July 2005, the State party contested the entirety of the legal and factual circumstances which the author complained of in his additional comments. Concerning the allegation that the Italian Government failed to lodge an objection with the Austrian Government in order to prompt it to recognize the violations of the fundamental rights set out in the Luxembourg and Hague conventions, the State party indicates that the complaints have no legal basis whatsoever. All the author's judicial and administrative initiatives against Austria benefited from the administrative and judicial support provided for in the conventions signed by the State party. In this regard, the State party refers to its earlier comments.

6.2 Concerning the merits, the State party indicates that the author acknowledges that the conduct of the Italian authorities did not cause any direct violation of the rights of the minors; such violations are to be ascribed exclusively to the decisions of the Austrian Government. The omissions of which the State party is accused do not constitute situations in law which enjoy protection under the mechanism established by the Covenant and protected by the Optional Protocol. The Preamble of the Optional Protocol defines the protection accorded by the Committee to the rights expressly recognized by the Covenant.

6.3 Concerning the author's arguments based on the United Nations Convention on the Rights of the Child, it is clear that the Committee is not competent to rule in that regard, under article 1 of the Optional Protocol.

The author's replies

7. In his response of 10 October 2005, the author reaffirms that the State party confined itself to forwarding his demands to Austria, and failed to take a stand on the abduction of the children or on the protection which Austria granted to the mother. The Italian Embassy in Austria had never been instructed to enquire into the situation of the abducted children, as provided for in Italian legislation. The State party caused irreparable harm to the children by declaring in writing that the children's fate was a matter for the Austrian courts alone. Lastly, the author indicates that it is highly unlikely that the Committee should not be entitled to take a position on the violation of children's rights. In any event, his rights as a father had been flouted because no steps had been taken by the Italian Government to enforce the many decisions of

the Italian courts: recognition and enforcement of the decisions concerning child custody, restoration of custody of the children and immediate return of the children to their legal place of residence.

Issues and proceedings before the Committee

8.1 Before considering any claim contained in a communication, the Human Rights Committee must, in accordance with rule 93 of its rules of procedure, decide whether or not the communication is admissible under the Optional Protocol to the Covenant.

8.2 The Committee notes that the State party has raised an objection as to the admissibility of the part of the communication relating to the Convention on the Rights of the Child, under article 1 of the Optional Protocol. While noting the legally imprecise language that the State party uses in its replies, the Committee interprets its objection of inadmissibility as pertaining to the entire communication. It is therefore up to the Committee to decide whether the admissibility criteria set out in the Optional Protocol have been met. Under article 5, paragraph 2 (a), of the Optional Protocol, the Committee is not authorized to examine a communication if the same matter is already being examined under another procedure of international investigation or settlement. The Committee has ascertained that the same matter is not being examined under another procedure of international investigation or settlement.

8.3 Concerning the alleged violation of article 2, paragraph 1, of the Covenant, the author states that the fact that he is not an Italian citizen suggests a violation of the right to respect for the individual on the grounds of his national origin. The Committee notes that the author acknowledges that he has no proof of this allegation of discrimination on the grounds of his nationality and which concerns the enjoyment of the rights contained in the Covenant. This allegation has thus not been substantiated for purposes of admissibility and is inadmissible under article 2 of the Optional Protocol.

8.4 Concerning the alleged violation of article 24 of the Covenant, the Committee notes that this violation should have been the subject of a complaint in the name of the author's children, but that the communication was not submitted in their name.[4] The Committee concludes that it is inadmissible under article 1 of the Optional Protocol.

8.5 Concerning the author's request that the State party institute proceedings against Austria before the Committee, the Committee notes that the procedure provided for in article 41 of the Covenant is quite distinct from the procedure laid down by the Optional Protocol, and that the author's complaints in this regard are therefore inadmissible because they are incompatible with the Covenant, under article 3 of the Optional Protocol.

8.6 The author refers to the State party's obligations under the Convention on the Rights of the Child, the Universal Declaration of Human Rights, the Schengen Treaty and The Hague and Luxembourg conventions. Under article 1 of the Optional Protocol, which empowers the Committee to receive and rule on communications from individuals who claim to be victims of a violation of any of the rights set out in the Covenant, the author's complaints in this regard are inadmissible.

8.7 Concerning the allegation of a violation of article 17 of the Covenant owing to the police's refusal to intervene when the author's home was burgled and the courts' refusal to acknowledge the unlawful nature of this interference, the Committee considers that none of these allegations has been sufficiently substantiated for the purposes of admissibility. Consequently, the complaints raised by the author in this regard are inadmissible, under article 2 of the Optional Protocol.

8.8 Concerning the complaints under article 23, the Committee considers that the author has not supplied sufficient information or arguments to substantiate his allegations under this provision for purposes of admissibility. The Committee therefore decides that the complaints raised by the author in this regard are inadmissible, under article 2 of the Optional Protocol.

8.9 The Committee recalls that article 2 of the Covenant can be invoked by individuals only in conjunction with other articles of the Covenant, and notes that article 2, paragraph 3 (a), stipulates that each State party undertakes "to ensure that any person whose rights or freedoms as ... recognized [in the Covenant] are violated shall have an effective remedy". Article 2, paragraph 3 (b), provides protection to alleged victims if their claims are sufficiently well-founded to be arguable under the Covenant. A State party cannot be reasonably required, on the basis of article 2, paragraph 3 (b), to make such procedures available no matter how unmeritorious such claims may be.[5] Considering that the author of the present communication has not substantiated his complaints for the purposes of admissibility under articles 17 and 23, his allegation of a violation of article 2 of the Covenant is also inadmissible, under article 2 of the Optional Protocol.

9. The Human Rights Committee therefore decides:

(a) That the communication is inadmissible under articles 1, 2 and 3 of the Optional Protocol;

(b) That this decision shall be communicated to the author.

[Adopted in English, French and Spanish, the French text being the original version. Subsequently to be issued in Arabic, Chinese and Russian as part of the Committee's annual report to the General Assembly.]

Notes

[1] "The removal or the retention of a child is to be considered wrongful where:

"(*a*) It is in breach of rights of custody attributed to a person, an institution or any other body, either jointly or alone, under the law of the State in which the child was habitually resident immediately before the removal or retention; and

"(*b*) At the time of removal or retention those rights were actually exercised, either jointly or alone, or would have been so exercised but for the removal or retention.

"The rights of custody mentioned in subparagraph (*a*) above may arise in particular by operation of law or by reason of a judicial or administrative decision, or by reason of an agreement having legal effect under the law of that State."

[2] "For the purposes of this Convention:

"(*a*) 'Rights of custody' shall include rights relating to the care of the person of the child and, in particular, the right to determine the child's place of residence;

"(*b*) 'Rights of access' shall include the right to take a child for a limited period of time to a place other than the child's habitual residence."

[3] "Notwithstanding the provisions of the preceding article, the judicial or administrative authority of the requested State is not bound to order the return of the child if the person, institution or other body which opposes its return establishes that:

"(*a*) The person, institution or other body having the care of the person of the child was not actually exercising the custody rights at the time of removal or retention, or had consented to or subsequently acquiesced in the removal or retention; or

"(*b*) There is a grave risk that his or her return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation.

"The judicial or administrative authority may also refuse to order the return of the child if it finds that the child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of its views.

"In considering the circumstances referred to in this article, the judicial and administrative authorities shall take into account the information relating to the social background of the child provided by the Central Authority or any other competent authority of the child's habitual residence."

[4] See communication No. 514/1992, *Fei v. Colombia*, Views adopted on 4 April 1995, para. 5.2.

[5] Communication No. 972/2001, *Kazantzis v. Cyprus*, decision adopted on 7 August 2003, para. 6.6; No. 1036/2001, *Faure v. Australia*, Views adopted on 31 October 2005, para. 7.2.

APPENDIX

Dissenting opinion by Committee member Mr. Rafael Rivas Posada

On 25 July 2006, the Humans Rights Committee decided that communication No. 1229/2003 (*Dumont de Chassart v. Italy*) was inadmissible owing to the author's failure to substantiate his allegations concerning violations of various articles of the Covenant (2, paras. 1 and 3 (a) and (c); 17; 23, paras. 1 and 4; and 24, para. 1).

I disagree with the Committee's conclusion, except with regard to article 24 of the Covenant, since the communication was not submitted on behalf of the author's children, which makes it inadmissible under article 1 of the Optional Protocol.

The grounds for admissibility of communications submitted to the Committee often pose interpretation problems of varying degrees of difficulty. Some, such as the exhaustion of domestic remedies, the fact that the same matter is not being examined under another procedure of international investigation or settlement, and the fact that the communication is not anonymous, are relatively clear and explicit and do not pose serious obstacles to their interpretation. Others, however, require the Committee to apply interpretation criteria that are generally debatable. This category includes the abuse of the right to submit communications, possible incompatibility with the provisions of the Covenant and, above all, failure to substantiate allegations, as grounds for inadmissibility.

In the present case, the Committee has, in my opinion, again resorted to the much too frequent use of the grounds of failure to substantiate complaints in order to conclude that the communication is inadmissible. I believe that it is unacceptable that, when a complaint does not prima facie appear to violate the articles of the Covenant, the argument is used that it is not substantiated for the purposes of admissibility. The legal substantiation of the facts, which should lead to the consideration of the merits of the case in order to determine whether or not there has been a violation, is one concern; another, very different, matter is the seriousness and substantiation of complaints, which is the necessary condition that enables the Committee to examine a communication, without prejudging the merits of the case.

I do not agree with the Committee's statement in paragraph 8.2 of the Decision that, in spite of the legally imprecise language that the State party uses in its replies, it (the Committee) considers that the State party's objection of inadmissibility with respect to the Convention on the Rights of the Child as pertaining to the entire communication. I do not find anywhere in the State party's replies any opposition to the admissibility of the communication. What the State party is saying (paragraph 4.1 of the Decision) is that the author's allegation of a violation of article 2, paragraph 1, of the Covenant has no legal basis whatsoever. In other words, it considers that the facts as presented by the author do not constitute a violation of the article, which is very different from stating that the author has not substantiated his allegations, in order to be able to consider whether or not the allegations involve a violation.

The same State party considered that the facts as presented by the author were sufficiently substantiated in order for it to act in his defence. Far from considering his complaints as groundless, the State party, according to its own statements, provided the author with the necessary judicial and administrative support, "in keeping with the provisions of the international conventions to which Italy is a party" (para. 4.1). On various occasions, the authorities of the State party intervened to defend the author's interests, which indicates that they always considered that the facts as presented merited due consideration, and that only the attitude of the Austrian authorities prevented the author from obtaining the treatment to which he believed he had a right.

To sum up, I consider that the author sufficiently substantiated his claims for the purposes of the admissibility of the communication under articles 2, 17 and 23 of the Covenant, without prejudging whether or not there was a violation of the aforementioned articles.

Bogotá, 15 August 2006

(*Signed*): Rafael Rivas Posada

[Done in English, French and Spanish, the Spanish text being the original version. Subsequently to be issued in Arabic, Chinese and Russian as part of the Committee's annual report to the General Assembly.]

S. Communication No. 1279/2004, *Faa'aliga v. New Zealand* (Decision adopted on 28 October 2005, eighty-fifth session)*

Submitted by: Moleni Fa'aaliga and Faatupu Fa'aaliga (represented by counsel, John Steven Petris)

Alleged victim: The authors and their children Salom, Blessing and Christos

State party: New Zealand

Date of communication: 26 February 2004 (initial submission)

Subject matter: Expulsion to Samoa of parents of New Zealand-born children

Procedural issues: Exhaustion of domestic remedies - sufficient substantiation, for purposes of admissibility.

Substantive issues: Protection of the family unit - Measures of protection for minors

Articles of the Covenant: 23, paragraph 1, and 24, paragraph 1

Articles of the Optional Protocol: 5, paragraph 2 (b)

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 28 October 2005,

Adopts the following:

Decision on admissibility

1. The authors of the communication, initially dated 5 February 2004, are Moleni and Faatupu Fa'aaliga, Samoan nationals born 17 October 1969 and 4 February 1972. They bring the communication on their own behalves and on behalf of their children, Salom, Blessing and Christos, all New Zealand nationals born on 4 May 1996, 12 July 1999 and 29 September 2003, respectively. They claim to be victims of violations by New Zealand of their rights under articles 23, paragraph 1, and 24, paragraph 1, of the Covenant. They are represented by counsel.

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* The following members of the Committee participated in the examination of the present communication: Mr. Nisuke Ando, Mr. Prafullachandra Natwarlal Bhagwati, Mr. Alfredo Castillero Hoyos, Ms. Christine Chanet, Mr. Maurice Glèlè Ahanhanzo, Mr. Edwin Johnson, Mr. Walter Kälin, Mr. Ahmed Tawfik Khalil, Mr. Rajsoomer Lallah, Mr. Michael O'Flaherty, Ms. Elisabeth Palm, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Ivan Shearer, Mr. Hipólito Solari-Yrigoyen, Ms. Ruth Wedgwood and Mr. Roman Wieruszewski.

Factual background

2.1 Mr. Fa'aaliga arrived in New Zealand on 5 April 1996 and was granted a three week temporary permit, at the end of which he departed the country. Mrs. Fa'aaliga first came to New Zealand in late 1996 and gave birth to her oldest child Salom shortly thereafter, who thereby became a New Zealand citizen. In July 1996 upon expiry of her temporary permits she returned to Samoa, where her circumstances are said to be such that she was unable to support her child. In late 1997, Salom was brought to Samoa. In May 1999, Mrs. Fa'aaliga returned to New Zealand and was granted a one month temporary permit. On 12 July 1999, her second child, Blessing, was born. In October 1999, she returned to Samoa with Blessing. From July until November 2000, Blessing was brought back to New Zealand.

2.2 On 6 January 2002, the parents and Blessing returned to New Zealand and were granted visitor permits for a month, on the basis of a letter from Mr. Fa'aaliga's employer, a Samoan bank, that he had been granted three weeks recreational leave. On 24 January 2002, the parents sought to prolong their visitor's permits, which was rejected on the basis that the original permits had been granted for the duration Mr. Fa'aaliga's employer had granted him leave. The parents then stated that they wished to apply for residence, and were informed that they had until the expiry of their permits on 6 February 2002 to do so. On 6 February 2002, the permits expired, rendering the parents unlawfully present in New Zealand and requiring them by law to leave the country.

2.3 On 18 February 2002, the parents lodged an appeal under section 47 of the Immigration Act against the requirement to leave the country with the Removal Review Authority, arguing that the presence of New Zealand-born children raised sufficient humanitarian circumstances to justify the parents living in New Zealand. In that appeal, the Committee's decision in *Winata v. Australia*[1] was cited and relied upon by the parents.

2.4 On 31 March 2003, the Authority rejected the appeal. It set out the Committee's reasoning in *Winata* and accepted that the case "raise[s] important and relevant general principles, which have application in the present appeals", but considered that the facts in that case were "significantly different". The Authority considered that the existence of New Zealand born children did not, of itself, constitute a humanitarian circumstance allowing the parents to remain. It noted that the parents had spent the majority of their lives in Samoa and that the children were relatively young at ages 3 and 6 respectively and their lives would not be substantially disrupted. Rather, it was important for the children to remain with their parents and retain strong relationships in the immediate family. There was no evidence that the children's standard of living in Samoa, while different than in New Zealand, would be so inadequate as to jeopardise or compromise their development, contrary to article 27 of the Convention on the Rights of the Child. The older child, Salom, had been left with the mother's brother and his family previously, and it was unclear whether the child remained with that family. Nor, given that the parents had most recently settled in New Zealand for only 14 months, could it be said that they were very well settled in the country. The Authority indicated that the parents had seven days to leave the country voluntarily, before being exposed to the service of removal orders (which would exclude them for 5 years from returning to the country).

2.5 On 12 May 2003, counsel for the parents sought advice from the Associate Minister of Immigration as to whether their situation could be considered exceptional and that temporary permits could be granted. On 2 September 2003, the Associate Minister responded that no specific information had been provided and that there was insufficient information for an informed decision to be made. Full and proper representations needed to be made. On 23 September 2003, counsel for the parents made a fuller application for a special direction permitting the parents to remain. On 29 September 2003, a third child, Christos, was born, who departed New Zealand on 16 January 2004.[2] On 11 December 2003, having considered the applicable international instruments, the Associate Minister dismissed the application, and observed that as they were unlawfully present they were subject to service of removal orders.

2.6 On 20 January 2004, counsel for the parents again applied for a special direction, enclosing draft submissions of the communication to the Committee. By letters of 24 February and 14 June 2004, the Associate Minister confirmed the earlier decision, noting inter alia that submission of a communication alone to the Committee did not amount to a stay on removal. On 21 September 2004, Christos returned to New Zealand.

2.7 As to the exhaustion of domestic remedies, the authors argue that an appeal from the Authority to the High Court and Court of Appeal is only available on a point of law rather than a general review of the merits of the case. In the authors' view, there was no error of law by the Authority and thus no appeal was available. As to the Minister's decision, the decision is discretionary and there is no appeal to the courts.

The complaint

3. The authors argue that the rights of all members of the family under articles 23, paragraph 1, and 24, paragraph 1, of the Covenant have been violated. They refer to the Committee's decision in *Sahid v. New Zealand*[3] for the proposition that these articles have been properly invoked. As to article 23, the authors refer to a decision of admissibility of the European Commission on Human Rights in *Uppal v. United Kingdom*, where the Commission, holding the case admissible, considered that issues arising under article 8 of the European Convention were complex and that their determination should depend on the merits. The authors also argue that the exceptional circumstances identified by the Committee in *Winata v. Australia*[4] are satisfied here, as there are a greater number of children affected and the circumstances of the parents are poor. As to article 24, the authors argue that the children are New Zealand nationals and are entitled to the same measures of protection as other New Zealand children. As a result, they are being discriminated against by virtue of their parents not being New Zealand nationals.

Submissions by the State party on the admissibility and merits of the communication

4.1 By submission of 26 October 2004, the State party contested the admissibility and merits of the communication. Concerning admissibility, the State party contends that the communication is inadmissible for failure to exhaust domestic remedies and for want of sufficient substantiation. The State party argues, with reference to domestic jurisprudence, that statutory powers such as those exercised by the Removal Review Authority must be exercised in accordance with national and international human rights standards. The meaning of, approach to and weighing of those obligations are matters of law open to judicial scrutiny. The Committee's case law was cited to the Removal Review Authority and applied. Had that consideration been inadequate or flawed, it was open to correction on appeal to the High Court and Court of Appeal but the authors did not pursue such a course.

4.2 The State party also argues that the communication is insufficiently substantiated providing only broad and undetailed assertions with respect to article 23 and very little concerning article 24. It notes that the Committee rejected comparable arguments on this basis in *Rajan v. New Zealand*.[5] The very general assertions, beyond a bare reference to *Winata*, do not attempt to address the requirements of the Covenant at all, despite representation by counsel. No evidence is produced detailing the actual consequences to the family if returned to Samoa, or of any discrimination faced by the children. Finally, the assertion that the current situation falls within the "exceptional circumstances" described in *Winata* is not supportable.

4.3 The State party further made detailed on the merits of the communication as to why no violation of the Covenant was disclosed.

Comments on the State party's submissions

5. By letter of 14 December 2004, the authors responded to the State party's submissions. As to exhaustion of domestic remedies, the earlier submissions are reiterated. As to substantiation, for purposes of admissibility, the authors add that if the parents are required to return to Samoa they would have to make a decision as to whether to leave some or all of the children in New Zealand or take them to Samoa. If they return to Samoa with their children, they would be unable to provide the opportunities that the children are entitled to as New Zealand citizens. If on the other hand the children were left in New Zealand to avail themselves of the educational or other benefits of New Zealand citizenship, then the parents would be separated from their children. The authors also responded on the State party's submissions on the merits of the communication.

Issues and proceedings before the Committee

Consideration of admissibility

6.1 Before considering any claim contained in a communication, the Human Rights Committee must, in accordance with rule 93 of its rules of procedure, decide whether or not the complaint is admissible under the Optional Protocol to the Covenant.

6.2 As to the exhaustion of domestic remedies, the Committee observes that the authors did not appeal the decision of the Removal Review Authority to the High Court on a point of law, which the authors contend was not raised in the present case. The Committee notes, however, that the Authority considered its case law, setting out its reasoning in *Winata* and concluding that that the scope of the decision in that case did not extend to the facts of the present case. The Committee observes however that issues of the interpretation of a particular Covenant provision or the application of a certain interpretation to particular facts raise issues of law; indeed, the authors invite the Committee to determine that the Authority's analysis was in breach of the Covenant. The Committee observes that these matters of law were not placed before the High Court, with the result that it is inappropriate to seek the same result from the Committee that could have been achieved before the domestic courts.[6] The Committee notes, moreover, that with respect to the effectiveness of this remedy in two previous communications against the State party concerning issues under the same articles of the Covenant the authors involved appealed from decisions of the administrative tribunal in question to the appellate courts.[7] It follows that the communication is inadmissible under article 5, paragraph 2 (b), of the Optional Protocol for failure to exhaust domestic remedies.

6.3 In light of this conclusion, the Committee need not address the remaining arguments of the State party.

7. The Human Rights Committee therefore decides that:

(a) The communication is inadmissible under article 5, paragraph 2 (b), of the Optional Protocol;

(b) This decision be communicated to the authors and to the State party.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the Committee's annual report to the General Assembly.]

Notes

[1] Case No. 930/2000, Views adopted on 26 July 2001.

[2] No information is provided as to who accompanied the child.

[3] Case No. 893/1999, Decision adopted on 28 March 2003, at para. 7.4.

[4] Op. cit.

[5] Case No. 820/1998, Decision adopted on 7 August 2003, at para. 7.3.

[6] See *Karawa v. Australia* case No. 1127/2002, Decision adopted on 21 July 2005.

[7] See *Sahid* and *Rajan*, op. cit.

T. Communication No. 1283/2004, *Calle Sevigny v. France* (Decision adopted on 28 October 2005, eighty-fifth session)*

Submitted by:	Adela Calle Savigny (not represented by counsel)
Alleged victim:	The author
State party:	France
Date of communication:	16 April 2004 (initial submission)
Subject matter:	Divorce procedure and its consequences
Procedural issues:	Exhaustion of domestic remedies; support of complaint
Substantive issues:	Protection of the home, equal rights and responsibilities for divorcing spouses, protection of children in the event of divorce, non-discrimination
Articles of the Covenant:	17; 23, paragraph 4; 24, paragraph 1; 26
Articles of the Optional Protocol:	2; 5, 2 (b)

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 28 October 2005,

Adopts the following:

Decision on admissibility

1.1 The author is Ms. Adela Calle Savigny, a French and Peruvian national resident in France. She claims to be a victim of violations by France of articles 17; 23, paragraph 4; 24, paragraph 1; and 26 of the International Covenant on Civil and Political Rights. She is not represented by counsel.

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* The following members of the Committee participated in the examination of the present communication: Mr. Nisuke Ando, Mr. Prafullachandra Natwarlal Bhagwati, Mr. Alfredo Castillero Hoyos, Mr. Maurice Glèlè Ahanhanzo, Mr. Edwin Johnson, Mr. Walter Kälin, Mr. Ahmed Tawfik Khalil, Mr. Rajsoomer Lallah, Mr. Michael O'Flaherty, Ms. Elisabeth Palm, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Ivan Shearer, Mr. Hipólito Solari-Yrigoyen, Ms. Ruth Wedgwood and Mr. Roman Wieruszewski.

Pursuant to rule 90 of the Committee's rules of procedure, Ms. Christine Chanet did not participate in the consideration of this communication.

1.2 On 1 September 2004 the Committee, through the person of its Special Rapporteur on new communications, decided to consider the admissibility of the communication separately from the substance.

The facts as presented by the author

2.1 The author married Mr. Jean-Marc Savigny on 10 October 1998 in Feigères (Haute-Savoie, France). On 26 September 2000, Mr. Savigny filed for a fault divorce before the family affairs judge at the High Court in Thonon-les-Bains. By a non-conciliation order dated 15 December 2000, the judge allowed the author free use of the marital home pending the issuance of the divorce decree and ordered Mr. Savigny to pay alimony.

2.2 On 5 December 2003, the author and her son (the issue of another union) were illegally evicted from the marital home by Mr. Savigny. The author appealed to the authorities, who afforded her no protection or redress.

2.3 Without a court order to that effect, Mr. Savigny stopped paying alimony in October 2003. The author applied to the judicial authorities, to no avail.

2.4 From the start of the divorce proceedings, the author claims to have suffered constant discrimination at the hands of the authorities, who failed to support her.

The complaint

3.1 The author contends that her forced eviction, together with her son, from the marital home by her former spouse in the absence of a court decision, and the lack of action by the authorities, are contrary to articles 17 and 24, paragraph 1, of the Covenant.

3.2 The author believes that her former spouse's suspension of alimony payments and the failure of the judicial authorities to intervene are in violation of article 23, paragraph 4, of the Covenant.

3.3 The author considers that the discrimination she suffered at the hands of the authorities, owing to her Peruvian origins in particular, amounts to a violation of article 26 of the Covenant.

State party's observations on admissibility

4.1 In observations dated 4 August 2004, the State party challenges the admissibility of the communication.

4.2 Given the sometimes approximate information supplied by the author, the State party offers an account of the proceedings associated with Ms. Calle Savigny's divorce and their consequences.

4.3 As regards civil proceedings before the family affairs judge, the State party indicates that on 26 September 2000, Mr. Savigny lodged a petition for fault divorce with the family affairs judge at the High Court in Thonon-les-Bains.

4.4 On 15 December 2000, the judge issued a non-conciliation order which permitted the spouses to live apart, granting free use of the marital home to the author pending the issuance of the divorce decree and ordering Mr. Savigny to pay alimony of 6,000 francs per month.

4.5 On 19 March 2001, continuing with the procedure after the non-conciliation order, Mr. Savigny sued his wife for divorce.

4.6 On 22 November 2001 the examining magistrate ruled in first instance, in adversarial proceedings, against an application by Mr. Savigny to reduce the size of his alimony payments. The judge also found, on the other hand, that the author had shown no indication of having looked for work since the issuance of the non-conciliation order and that "given the brevity of their life together and the absence of any common offspring, the possibility that Adela Calle Savigny might long remain in her current situation, occupying property belonging to her husband and living solely off the alimony her husband [was] paying to her, [was] not to be thought of". The judge therefore ruled that, four months after the ruling, the author should no longer have free use of the marital home.

4.7 After several exchanges of proposals, the family affairs judge issued a preliminary ruling reopening the discussions in adversarial proceedings on 24 March 2003.

4.8 On 6 November 2003, the family affairs judge handed down a non-stayable ruling in first instance in which he found that that author had neither submitted a definitive claim nor supplied the evidence asked for in the preliminary ruling of 24 March 2003. He observed that the author appeared to be "profiting from the protraction of the procedure which, it may be pointed out, has already lasted much longer than is normal". He also indicated that the marital home was no longer assigned to the author, whom he ordered to leave the premises within the month following the ruling. Lastly, the judge suspended the alimony payments due from Mr. Savigny. The State party notes that the author did not attend that hearing although she had been kept regularly informed of Mr. Savigny's proposals.

4.9 By decision dated 12 February 2004, the family affairs judge, after discussions in chambers, publicly delivered a judgement in first instance after adversarial proceedings declaring the couple divorced with fault on both sides. He confirmed the ruling of 6 November 2003 to the effect that the author and any related occupant must remove herself and her belongings from the marital home, the personal property of Mr. Savigny. He also found that there were no grounds for a compensatory award given the brevity of the couple's life together and the absence of any request of that kind.

4.10 The author had the support of counsel during the proceedings before the family affairs judge. She did not appeal any of the judge's decisions.

4.11 As regards criminal proceedings, the State party refers first to the author's complaint dated 12 December 2003. In response, it indicates, to a complaint lodged by the author (relating to issues including the conditions under which she had had to leave the housing she had been occupying with her minor son, under constraint from her husband and in the absence of a court decision) with the government prosecutor of Thonon-les-Bains on 12 December 2003, the gendarmerie conducted an investigation on instructions dated 19 December 2003 from the prosecutor's office.

4.12 The prosecutor's office shelved the proceedings with no further action taken on 1 March 2004, given the particular circumstances of the case, especially the conduct of the author and the family affairs judge's decisions relating to the assignment of the housing in question and comments about the brevity of the couple's life together. When interviewed by the gendarmes, the mayor of the commune indicated that the town hall had lent the author somewhere to store her belongings and had also offered to help her find housing, but this the author had refused.

4.13 In reference to the complaint about non-payment of alimony, the State party contends that contrary to what the author claims, her complaint of 11 September 2003 about non-payment of alimony was investigated by the gendarmerie. Mr. Savigny acknowledged that he had not paid any alimony since April 2003 since the author was wilfully dragging out the divorce process. He was summoned before the correctional court to answer the charge of failure to pay alimony during the period when payment was due. The hearing was set for 24 September 2004.

4.14 The State party then sets out its grounds for considering the communication inadmissible.

4.15 Referring to the Committee's jurisprudence, the State party considers that the part of the complaint relating to a violation of article 26 of the Covenant is not adequately supported and thus inadmissible. It argues that the author's complaint is based on mere statements that the administrative, social and judicial authorities discriminated against her, with no specific evidence to support them. The author provides no indication as to how article 26 might have been violated.[1]

4.16 On the alleged violation of article 17 of the Covenant, the State party points out that the housing in which the author stayed with her son was the personal property of Mr. Savigny of which she no longer had free use four months after the ruling of 22 November 2001 - a ruling of which she could not claim to be unaware since it had been issued in adversarial proceedings. Moreover, during the investigation by the gendarmerie, Mr. Savigny stated that his wife did not always stay there, and that for some months the neighbours had been looking after her son during her absences. Mr. Savigny himself had moved out during 2000 and did not return until 5 December 2003 - a period rather longer than he and his wife had lived together. At any rate, since the marital home was, by the time of the complaint (December 2003), no longer assigned to the author, that part of the communication was unfounded and thus fell *ratione materiae* outside the field of application of the Optional Protocol.

4.17 The State party explains that the communication is, furthermore, inadmissible owing to a failure to exhaust internal remedies.

4.18 In the case of the alleged violations of articles 17 and 24, paragraph 1, of the Covenant in connection with the eviction of the author from the marital home and its consequences, the State party draws attention to the fact that, assuming the Committee determines that article 17 applies, the author's complaint of 12 December 2003 was, contrary to what she asserts, not only investigated but also diligently handled. The government prosecutor's office referred the matter to the gendarmerie only days after receiving it. The gendarmes acted with equal dispatch, launching an investigation in January 2004. It was true that the case had been shelved with no further action taken; but there were available to the author codified, accessible, effective internal remedies against the decision to shelve the case, either by reporting Mr. Savigny directly to the correctional court or by complaining to the investigating magistrate about the matters raised in her complaint and applying for criminal indemnification. On the civil side, the State party observes that the author did not appeal against any of the decisions relating to alimony or assignment of the marital home which lie behind the alleged violations of articles 17 and 24, paragraph 1, either during the interim arrangements or when the divorce decree was issued; yet the related proceedings were adversarial and the author was assisted by counsel. Similarly, the author had never sought protection for her minor son from the family affairs judge or other court. In sum, the author has not exhausted the remedies available in the case of article 17 of the Covenant (if applicable), and has not given the national authorities the opportunity to rectify the alleged violation of article 24, paragraph 1. The complaints relating to the marital home and protection for her son are, therefore, inadmissible. In the case of her son, for whom the complaints stemming from articles 17 and 24, paragraph 1, are not substantially different, the author does not indicate how the child might actually have been in any danger since both he and she were later put up by friends.

4.19 In connection with the alleged violation of article 23, paragraph 4, of the Covenant, the State party points out that under French law, cases of divorce, separation and their consequences, both for spouses and for children of the union, are handled by family affairs judges. It was in this way that the author was originally awarded alimony, although, the State party also points out, she never requested financial support for her son (who is unrelated to Mr. Savigny) from any court. The State party draws attention to the fact that the author's complaint about non-payment of alimony, lodged on 11 September 2003, led to a gendarmerie investigation. Mr. Savigny was summoned before the correctional court for non-payment, and the hearing was set for 24 September 2004. Proceedings are thus in progress. It follows that internal remedies have not been exhausted. Further to these proceedings, on 8 July 2005 the State party forwarded the decision handed down on 1 December 2004 by the High Court in Thonon-les-Bains on the issue of non-payment of alimony. The court found Mr. Savigny guilty of not voluntarily making alimony payments for two months. Inasmuch as reparation had been made for the injury caused and the offence had thus ceased to cause any inconvenience, the court, pursuant to article 132-59 of the Penal Code, decided to impose no punishment on Mr. Savigny.

4.20 As regards the alleged violation of article 26 of the Covenant, the author has lodged no complaint about incidents of discrimination on the grounds of her nationality or other considerations. Articles 225-1 ff. of the French Penal Code as they applied at the time of the events at issue make any discrimination on grounds of origin, sex, family situation, or membership or otherwise of a specified ethnic group, nation, race or religion a punishable offence. The author has thus not given the French authorities the opportunity to rectify any violation of article 26.

Comments by the author on the State party's observations on admissibility

5. In comments submitted on 22 January and 23 September 2005, the author impugns the lawyer assigned to her under the legal aid system who, she states, did not keep her informed of the state of proceedings or the opportunities for appeal. She considers that the entire process was slanted in a manner designed to keep her at arm's length and allow her no opportunity to intervene. She accuses Mr. Savigny and his family of plotting to prevent her from defending herself before the French authorities. She states that she has not appealed against the decision of 1 December 2004 by the High Court of Thonon-les-Bains, but demands recognition and application of her rights.

The Committee's deliberations on admissibility

6.1 Before considering any claim contained in a communication, the Human Rights Committee must, in accordance with rule 87 of its rules of procedure, decide whether or not the communication is admissible under the Optional Protocol to the Covenant.

6.2 The Committee has, as required by article 5, paragraph 2, of the Optional Protocol, ascertained that the same matter is not being examined under another procedure of international investigation or settlement.

6.3 Concerning the matters raised by the author, the Committee observes that the author has not availed herself of the internal remedies available under criminal law, appealing against the decision to shelve her complaint of 12 December 2003 without further action and the decision handed down on 1 December 2004 by the High Court in Thonon-les-Bains or, civil law, appealing against the rulings by the family affairs judge on 6 November 2003 and 12 February 2004 concerning the assignment of the marital home and the award of alimony, these having been delivered in adversarial proceedings where the author was assisted by counsel. The case file and the parties' submissions also show that the author did not apply to the courts for protection for her son or make use of the internal remedies available to her for responding to her allegations of discrimination. As regards the author's argument that the lawyer assigned to her under the legal aid system did not keep her informed, even of the opportunities for appeal, it is clear from the case file that the author at no point during the proceedings challenged the aid her counsel was giving her or asked for a replacement. The Committee thus finds her complaints inadmissible under article 5, paragraph 2 (b), of the Optional Protocol.

7. The Committee therefore decides:

(a) That the communication is inadmissible under article 5, paragraph 2 (b), of the optional Protocol;

(b) That this decision shall be communicated to the State party and the author.

[Adopted in English, French and Spanish, the French text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the Committee's annual report to the General Assembly.]

Note

[1] Assuming, for the purposes of argument, that the author could prove she and her son had been subjected to harassment and moral pressure, there is still nothing to show that such treatment stemmed from discrimination.

U. Communication No. 1289/2004, *Farangis v. Netherlands* (Decision adopted on 27 March 2006, eighty-sixth session)*

Submitted by:	Farangis Osivand (represented by counsel)
Alleged victims:	The author and her two daughters, Soolmas Mahmoudi and Maral Mahmoudi
State party:	The Netherlands
Date of communication:	14 April 2004 (initial submission)
Subject matter:	Expulsion of family from Netherlands to Iran to face alleged risk of death, torture or imprisonment
Procedural issues:	Submission of same matter to another international procedure - Exhaustion of domestic remedies - Review of decision on admissibility
Articles of the Covenant:	Articles 6, 7 and 9
Articles of the Optional Protocol:	Article 5, paragraphs 2 (a) and (b)

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 27 March 2006,

Adopts the following:

Decision on admissibility

1.1 The author of the communication, initially dated 14 April 2004, is Ms. Farangis Osivand, an Iranian national born on 18 February 1959. She presents the communication on her own behalf and on behalf of her two daughters, Soolmas Mahmoudi, an Iranian national born on 23 December 1983, and Maral Mahmoudi, an Iranian national born on 15 April 1989. The author contends that the expulsion of the three alleged victims to Iran would violate articles 6, 7 and 9 of the Covenant. The author is represented by counsel.

1.2 On 24 November 2004, the Committee's Special Rapporteur on new communications decided to separate the consideration of the admissibility and merits of the communication.

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* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Nisuke Ando, Mr. Prafullachandra Natwarlal Bhagwati, Ms. Christine Chanet, Mr. Maurice Glèlè Ahanhanzo, Mr. Edwin Johnson, Mr. Walter Kälin, Mr. Ahmed Tawfik Khalil, Mr. Rajsoomer Lallah, Mr. Michael O'Flaherty, Ms. Elisabeth Palm, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Ivan Shearer, Mr. Hipólito Solari-Yrigoyen and Mr. Roman Wieruszewski.

Factual background

2.1 Ms. Osivand attended the University of Teheran from 1978 to 1979. During this period, she attended demonstrations against the Shah and was a member of the Fedayan Khalq Aghaliat opposition group. She acted as a contact person for the organization in her faculty and attended meetings on the work of Bijan Djazani, then a very influential leader in Iran. Although the organization was involved in violent activities, she was not herself involved in such actions.

2.2 In 1981, Ms. Osivand married Ahmad Mahmoudi. Around that time, she was asked by a member of the Fedayan Khalq Aghaliat organization to hide weapons in her house. Both she and her husband agreed and hid weapons in an underground cache constructed of brick, wood and iron under their house, which was under construction at the time. The same year, Ms. Osivand was forced to leave university. Around 1988, she could have recommenced her studies but refused, as she would only be admitted on condition that she informed on anti-revolutionary students.

2.3 From the time she left university, Ms. Osivand was required to report to the authorities at the Islamic Society of the University. This continued until the time of her flight to the Netherlands in late August 1998. She remained an active member of the Fedayan Khalq Aghaliat after leaving university, and became a courier for the organization, picking up and distributing leaflets and publications including for the programme with the goal of overthrowing the Islamic Republic of Iran.

2.4 On 13 August 1998, Ms. Osivand received a call from another member of the Fedayan Khalq Aghaliat, informing her that the authorities had found out that weapons had been hidden in her house and advising her and her family to leave Iran immediately. She was informed by a neighbour that agents of the (unspecified) "Komiteh" had called at her house, taken some goods and her father. She presumes that they found the abovementioned weapons, publications and leaflets. In late August 1998, she fled Iran with her two daughters. Because of lack of money, her husband stayed in hiding in Iran and followed her to the Netherlands two years later.

2.5 On 2 and 18 September 1998, Ms. Osivand was interviewed by the competent Dutch authorities about her asylum request. On 30 June 1999, her request for asylum was denied and her appeal was similarly rejected on 11 December 2000. On 11 February 2003, the District Court of 's-Hertogenbosch reviewed her case, and on 25 March 2003 denied her appeal, contending that Ms. Osivand had not provided her entire asylum account at the second interview. It did not accept that weapons would be hidden in the elaborate way suggested by Ms. Osivand and did not find her account credible.

2.6 On 10 June 2003, the same Court dismissed the appeal of Mr. Mahmoudi.
On 25 November 2003, since the judgement of the District Court, a declaration was allegedly published by the Fedayan Khalq Aghaliat, confirming that Ms. Osivand is an opponent of the Islamic Republic of Iran, that she is blacklisted by the regime due to her political activities and her sympathies for their organization. It claims that her life would be in danger if returned to Iran and that she risks long imprisonment or even the death penalty.

2.7 On 15 December 2003, Ms. Osivand's lawyer received a letter from the president of the Society of Iranian Women in the Netherlands, in which the writer claims that she had known Ms. Osivand in Iran after the revolution and had known her to be a member of the Fedayan

Khalq Aghaliat. The writer adds that Ms. Osivand has remained an active member of this organization to the present day. On 18 December 2003, the Dutch Ministry of Justice refused an application for a humanitarian exception for the family.

The complaint

3.1 The author claims a violation of the alleged victims' rights under articles 6, 7 and 9 of the Covenant by the Netherlands, for not recognizing them as political refugees and threatening to remove them to Iran where their life and freedom would be at risk because of Ms. Osivand's involvement with and membership in the Fedayan Khalq Aghaliat, her hiding of weapons on the organization's behalf, and her failure to inform the Iranian authorities of her acts.

3.2 Without citing any articles of the Covenant, the author alleges that from the beginning to the end of the asylum procedure, she never had an opportunity to give a complete chronological account of her life in Iran. She also contends that the nature of the Dutch asylum procedure is such that asylum seekers are not heard in a chronological and systematic way, adding that the District Court of 's-Hertogenbosch did not pose any questions to her during the proceedings in early 2003.

State party's submissions on admissibility and counsel's comments

4.1 By submission of 11 November 2004, the State party argued that the communication was inadmissible for concurrent examination of the same matter under another international procedure and for failure to exhaust domestic remedies.

4.2 As to the former objection, the State party observed that the author's husband, Ahmad Mahmoudi, had lodged an application with the European Court of Human Rights on 8 December 2003. According to the State party, this application "apparently also relates to the problems the Osivand-Mahmoudi family would face upon return to Iran on account of the difficulties the husband and wife experienced as sympathizers or members of the prohibited Mojahedin-e-Khalq party, for which party they claim to have been activists". Examination of the documents submitted in both applications made it "abundantly clear" that the subject matter of both claims was identical. Both applications invoked human rights instruments in order to contest the family's expulsion, and it could be assumed that each spouse spoke for the other when submitting the respective application. The application before the European Court was still pending and, therefore, the communication was inadmissible under article 5, paragraph 2 (a), of the Optional Protocol.

4.3 As to the latter objection, the State party observed that the author made a number of unspecified critical comments about Dutch asylum proceedings. In domestic proceedings, neither the author nor her representative had submitted specific objections against the procedures followed, thus denying the domestic courts the opportunity to respond to those objections. The author had thus failed to exhaust domestic remedies on this aspect of the communication. The State party added that this complaint was an impermissible *in abstracto* allegation about legislation and practice. The author had not submitted any specific complaint about the asylum procedure in relation to article 7 of the Covenant, let alone substantiated such a complaint.

5.1 By letter of 10 January 2005, counsel responded to the State party's submissions. He pointed out that no part of the family was advanced as co-victim(s) in the application presented by the other part to an international instance. Each part of the family claimed breaches of their own rights before the respective instance, and it was incorrect to suggest that each spouse spoke for the other in the respective applications. He argued that he addressed Mr. Mahmoudi's case to the European Court "for reasons of subsidiarity", as because of the six-month time limit for filing cases at the European Court he could no longer submit the author's case to that instance.

5.2 He contended that as the cases of the mother and daughters on the one hand and that of the father on the other were treated separately by the Dutch authorities - the father having arrived later - there was no objection for submission of the family's case to two separate instances. He argued that the State party's reference to the Mojahedin-e-Khalq was erroneous, and maintained that the claim under article 7 was sufficiently substantiated, in light of the declaration and letter of 25 November 2003 and 15 December 2003, respectively.

Decision on admissibility

6.1 At its eighty-fourth session, the Committee considered the admissibility of the communication. It recalled that article 5, paragraph 2 (a), of the Optional Protocol precluded it from considering any communication where the same matter was being examined under another procedure of international investigation or settlement. The Committee recalled its jurisprudence that the "same matter" implied that the same claims had been advanced by the same person.[1] While the scope of the European Convention on Human Rights and the Covenant insofar as they related to the present facts were substantially equivalent (see *Rogl v. Germany*),[2] the application of those norms to two different persons of the same family might well raise differing issues, in particular if, as in the present case, the facts relating to different members of the family were not identical and were dealt with in different and unrelated domestic proceedings. As two separate persons were contesting differing sets of proceedings, and thus also differing facts, before the European Court of Human Rights and the Committee, the Committee thus found that the "same matter" was not currently before a parallel instance of international investigation or settlement. It followed that the Committee was not precluded by article 5, paragraph 2 (a), from considering the communication.

6.2 As to the procedural complaints which raised issues under article 7, read in conjunction with article 2, of the Covenant, the Committee observed that, according to the uncontested arguments of the State party, these matters were not advanced before its domestic courts. It followed that these aspects of the communication were inadmissible, under article 5, paragraph 2 (b), of the Optional Protocol, for failure to exhaust domestic remedies.

6.3 Accordingly, on 5 July 2005, the Committee found the communication admissible to the extent that the return of the author and her two daughters to Iran raised issues most appropriately addressed in combination under article 7 of the Covenant, without separately giving rise to additional issues under articles 6 and 9 of the Covenant.

Request for review of the decision on admissibility

7.1 By Note of 15 November 2005, the State party advised that the author had lodged a second request for asylum on 25 May 2005, which remained pending. As a result, the State party requested the Committee to review its decision on admissibility.

7.2 By letter of 2 December 2005, the author responded, confirming that a second request had been lodged, though noting unspecified "difficulties".

Issues and proceedings before the Committee

8. The Committee is requested to re-examine the admissibility of the communication in light of the new facts advanced by the State party. The Committee observes that the author has conceded that she has lodged a fresh application for asylum before the Dutch authorities. The Committee recalls its constant jurisprudence that where an author has lodged renewed proceedings with the authorities that go to the substance of the claim before the Committee, the author must be considered to have failed to exhaust domestic remedies, as required by article 5, paragraph 2 (b), of the Optional Protocol.[3] As in the communication of *Benali v. The Netherlands*,[4] the author has reseized the State party's authorities with an application which directly concerns the subject matter before the Committee. It follows that the author has not exhausted domestic remedies, and that the communication is inadmissible under article 5, paragraph 2 (b), of the Optional Protocol.

9. Accordingly, the Committee decides:

(a) That the communication is inadmissible under article 5, paragraph 2 (b), of the Optional Protocol; and

(b) That this decision will be transmitted to the author and, for information, to the State party.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the Committee's annual report to the General Assembly.]

Notes

[1] *Fanali v. Italy* communication No. 75/1980, Views adopted on 31 March 1983, and *Sánchez López v. Spain* communication No. 777/1997, Decision adopted on 25 November 1999.

[2] Communication No. 808/1998, Decision adopted on 25 October 2000.

[3] *Benali v. The Netherlands*, case No. 1272/2004, Decision adopted on 23 July 2004, *Romans v. Canada*, case No. 1040/2001, Decision adopted on 9 July 2004, and *Baroy v. The Philippines*, case No. 1045/2002, Decision adopted on 31 October 2003.

[4] Ibid.

V. Communication No. 1293/2004, *De Dios v. Spain*
(Decision adopted on 25 July 2006, eighty-seventh session)[*]

Submitted by:	Maximino de Dios Prieto (represented by counsel, Mr. José Luis Mazón Costa)
Alleged victim:	The author
State party:	Spain
Date of communication:	17 June 2002 (initial submission)
Subject matter:	Conviction of the author on insufficient evidence
Procedural issues:	Failure to substantiate claims
Substantive issues:	Failure of the court of second instance to reconsider the facts
Articles of the Covenant:	14, paragraph 5
Articles of the Optional Protocol:	2

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 25 July 2006,

Adopts the following:

Decision on admissibility

1. The author of the communication, which is dated 17 June 2002, is Maximino de Dios Prieto, who claims to be a victim of a violation by Spain of article 14, paragraphs 1 and 5, of the Covenant. He is represented by counsel, Mr. José Luis Mazón Costa. The Optional Protocol entered into force for the State party on 25 April 1985.

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[*] The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Nisuke Ando, Mr. Prafullachandra Natwarlal Bhagwati, Mr. Maurice Glèlè Ahanhanzo, Mr. Edwin Johnson, Mr. Walter Kälin, Mr. Ahmed Tawfik Khalil, Mr. Rajsoomer Lallah, Ms. Elisabeth Palm, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Ivan Shearer and Mr. Hipólito Solari-Yrigoyen.

Factual background

2.1 In December 1999, the author was arrested by members of the Civil Guard for the alleged offence of trafficking in drugs (hashish). Five months later, he was accused of having committed the offence of bribery, namely for having offered 10 million pesetas to one of the Civil Guards who took part in his arrest.

2.2 In its ruling of 23 February 2001, the Oviedo Provincial High Court sentenced the author to four years' and six months' imprisonment and a fine of 400 million pesetas for the offence of drug trafficking, and to three years' imprisonment and a fine of 10 million pesetas for the offence of bribery. During the trial, the author denied his involvement in either offence. The author points out that there is no verbatim record of the trial, since the Criminal Procedures Act allows only a summary of the proceedings, and the summary reflects, at most, one seventh of the content of the statements made.

2.3 The author submitted an appeal to the Supreme Court (*recurso en casación*); this remedy does not allow the reconsideration of the primary evidence for the prosecution that was decisive in the author's conviction. In order to substantiate his claims, he cites a paragraph of the Court's ruling in which the Court states: "With regard to the violation of the right to the presumption of innocence, such a complaint is equivalent to the claim of having been convicted in the absence of evidence and obliges this court of cassation to examine the evidentiary hearing, while it does not have the competence to examine the 'ruling on the evaluation of the evidence', which falls within the purview of the sentencing court by virtue of its direct involvement in the case."

2.4 Lastly, with regard to the complaints concerning the absence of a court of appeal for criminal cases, the author points out that the remedy of *amparo* is useless since, according to the established case-law of the Constitutional Court, the absence of such a court is not in violation of article 14, paragraph 5, of the Covenant.

The complaint

3.1 The author claims a violation of article 14, paragraph 5, of the Covenant and refers to the Committee's Views concerning communication 701/1996 (*Gómez Vázquez v. Spain*), in which such a violation was disclosed. According to the author, this provision implies the right to a comprehensive review of the conviction in all its aspects.

3.2 The author also points out that the records of the trial do not reflect everything that took place during the trial, and that it is inherent to a fair trial with the right to a second hearing to have a verbatim record that reflects everything that occurred during the oral proceedings. This allegedly resulted in a violation of article 14, paragraphs 1 and 5, of the Covenant.

The State party's observations on admissibility and the merits

4.1 In its note verbale dated 2 August 2004, the State party enumerated the reasons adduced by the author in his appeal: violation of the fundamental right to the judge predetermined by law; violation of the right to the presumption of innocence and *in dubio pro reo*, also with regard to the offence of bribery; improper application of the Criminal Code in the calculation of the sentences and the application of the aggravating circumstance of recidivism; violation of the Criminal Code with respect to the imposition of fines; error in the documentation regarding conduct constituting bribery. All these reasons were dismissed because no violation of any basic rights or procedural norms or errors in the application of provisions of the Criminal Code were found.

4.2 The alleged violations that were referred to the Committee were never brought before the domestic courts, which therefore indicates that domestic remedies have not been exhausted. The author had repeated access to the courts, obtained well-founded decisions in which the domestic courts replied fully to his allegations, and he submits a communication to the Committee concerning the alleged violation of basic rights different from those alleged in domestic courts and without exhausting domestic remedies. The communication is therefore unsubstantiated, since the author is trying to make use of the mechanism of the Covenant in clear abuse of its purpose. The State party requests the Committee to declare the communication inadmissible because it is incompatible with the provisions of the Covenant, in accordance with article 3 of the Optional Protocol, and because the author failed to exhaust domestic remedies.

4.3 On 31 May 2005, the State party reiterated the arguments contained in the preceding paragraphs and also submitted its observations on the merits of the communication.

4.4 The State party refers to the ruling of the Supreme Court and, more specifically, to the paragraph of the ruling cited by the author. It points out that the author deliberately ignores the paragraphs that follow the cited paragraph, and which refer to the evidential activity of the Provincial High Court with respect to the offence of bribery. The Supreme Court carried out a comprehensive review of the evidence for the conviction, for which reason the appealed conviction and penalty were submitted, with full guarantees, to a higher court.

4.5 With regard to the author's allegations that there was no verbatim record of the trial, in no case does article 14 of the Covenant require that court proceedings be recorded verbatim, provided that the record of the proceedings contains everything required for the defence of the person being tried. Moreover, at no time did the author claim before the Supreme Court or the Constitutional Court that his right to a fair trial had been violated because there had been no verbatim record of the proceedings of the Provincial High Court. For this reason, and independently of the fact that the complaint has no merit, the complaint should be declared inadmissible under article 3 of the Optional Protocol.

The author's comments

5. In his comments of 29 July 2005, the author points out that the Constitutional Court systematically rejects, without consideration on the merits, any complaint concerning the lack of a second hearing based on the Committee's jurisprudence. Moreover, the author maintains that he did not have access to a genuine review of his conviction for either of the two offences - trafficking in hashish and bribery - for which he was sentenced and in which he denied any involvement. The sentence handed down by the Oviedo Provincial High Court is based on an examination of the primary evidence for the prosecution - evidence which the author rejects. The Supreme Court ruling establishes limits on criminal appeals in cassation: evidence cannot

be reconsidered in such appeals. The legal framework of such an appeal did not allow the author to request a re-examination of the evidence that resulted in his conviction; this legal limitation is contrary to article 14, paragraph 5, of the Covenant. There is also no real right to a second hearing when there is no verbatim record that reflects in detail all the statements made by witnesses, experts and intervening parties.

Issues and proceedings before the Committee

6.1 Before considering any claim contained in a communication, the Human Rights Committee must, in accordance with rule 93 of its rules of procedure, decide whether or not the communication is admissible under the Optional Protocol to the Covenant on Civil and Political Rights.

6.2 The Committee has ascertained, as required under article 5, paragraph 2 (a), of the Optional Protocol, that the same matter is not being examined under another procedure of international investigation or settlement.

6.3 The Committee has noted the State party's argument that domestic remedies were not exhausted, since the alleged violations that were referred to the Committee were never brought before the domestic courts. However, the Committee recalls its established jurisprudence that it is only necessary to exhaust those remedies that have a reasonable prospect of success.[1] An application for *amparo* had no prospect of success in relation to the alleged violation of article 14, paragraph 5, of the Covenant, and the Committee therefore considers that domestic remedies have been exhausted.

6.4 The author alleges a violation of article 14, paragraph 5, of the Covenant, owing to the fact that the primary evidence for the prosecution that was decisive in his conviction was not reviewed by a higher court, since under Spanish law an application to the Supreme Court is not an appeal procedure and does not permit such a review. The Committee notes that the author does not explain the reasons why he believes that the court of first instance did not make a correct evaluation of the evidence, nor does he indicate to which of the offences the evidence that he considers disputable applies. On the other hand, the Supreme Court ruling indicates that the Court considered at length the evaluation by the court of first instance of the evidence relating to the offence of bribery, and concluded that that court's evaluation had been correct. In the view of the Committee, the complaint relating to article 14, paragraph 5, has not been sufficiently substantiated for the purposes of admissibility, and the Committee concludes that it is inadmissible under article 2 of the Optional Protocol.

6.5 With regard to the author's claims in relation to article 14, paragraph 1, based on the lack of a verbatim record of the trial, the Committee notes that the author has not explained why he considers that the record of the trial held in the Provincial High Court did not correctly reflect what took place during the proceedings and why it infringes his rights. Moreover, the author did not file any kind of remedy in connection with that complaint. Consequently, the Committee is of the view that this part of the communication must also be considered inadmissible owing to the author's failure to exhaust domestic remedies, in accordance with article 5, paragraph 2 (b), of the Optional Protocol.

7. The Human Rights Committee therefore decides:

(a) That the communication is inadmissible under article 2 and article 5, paragraph 2 (b), of the Optional Protocol;

(b) That this decision shall be communicated to the author and to the State party.

[Adopted in English, French and Spanish, the Spanish text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the Committee's annual report to the General Assembly.]

Note

[1] See, for example, communication No. 511/1992, *Lansman et al. v. Finland,* Views adopted on 14 October 1993, para. 6.3; 1095/2002, *Gomaritz v. Spain,* Views adopted on 26 August 2005, para. 6.4; or 1101/2002, *Alba Cabriada v. Spain,* Views adopted on 3 November 2004, para. 6.5.

W. Communication No. 1302/2004, *Khan v. Canada*
(Decision adopted on 25 July 2006, eighty-seventh session)*

Submitted by: Dawood Khan (represented by counsel, Stewart Istvanffy)

Alleged victim: The author

State party: Canada

Date of communication: 30 July 2004 (initial submission)

Subject matter: Deportation to country of origin with risk of torture

Procedural issues: None

Substantive issues: Risk of torture and death, review of expulsion order, unfair "suit at law", and ineffective remedy

Articles of the Covenant: 2, 6, 7, 14 and 18

Articles of the Optional Protocol: 2

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 25 July 2006,

Having concluded its consideration of communication No. 1302/2004, submitted to the Human Rights Committee by Dawood Khan under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the author of the communication, and the State party,

Adopts the following:

Decision on admissibility

1. The author of the communication is Mr. Dawood Khan, born on 31 July 1950, a Pakistani national, currently residing in Canada and awaiting deportation to Pakistan. He claims to be a

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* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Nisuke Ando, Mr. Prafullachandra Natwarlal Bhagwati, Mr. Maurice Glèlè Ahanhanzo, Mr. Edwin Johnson, Mr. Walter Kälin, Mr. Ahmed Tawfik Khalil, Mr. Rajsoomer Lallah, Ms. Elisabeth Palm, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Ivan Shearer and Mr. Hipólito Solari-Yrigoyen.

victim of violations of articles 2, 6, 7, 14 and 18 of the International Covenant on Civil and Political Rights. He is represented by counsel, Stewart Istvanffy. The Optional Protocol entered into force for Canada on 19 August 1976.

Facts as submitted by the author

2.1 The author is a Christian. He was born in Quetta in the province of Baluchistan, a stronghold for the Sunni terrorist group, Sipah-E-Sahaba. There have been massacres of religious minorities in Quetta. The author was involved in most of the important religious events of his church. He is a well-known musician playing a traditional instrument called the *tabla*. In December 1998, he acted as a judge at the Baluchistan province music competition. Members of the Sipah-E-Sahaba group threatened him after the competition because he nominated, and voted for, a Christian girl who eventually won the first prize.

2.2 In July 1999, the author moved from Quetta to Lahore in Punjab to escape persecution. On 31 December 1999, he was kidnapped by five militants of the Sipah-E-Sahaba group. During his detention, he was threatened with death or torture if he did not convert to Islam and allegedly suffered sexual abuse. In support of this allegation, he provides a medical report dated 10 August 2004 attesting that he suffers from post-traumatic stress disorder resulting from the physical, psychological and sexual assault he suffered in Pakistan.

2.3 On 7 January 2000, a man came to his home to inform him that he would be forced to convert to Islam on 14 January 2000 at the June-e-Masjed mosque. On 5 February 2000, the author and his family fled to Waziribad. After consulting with the "leadership of his community" and his family, he was advised to seek refuge outside Pakistan. He secured an invitation to play in Canada, obtained a visa, and left Pakistan on 22 April 2000. Since his departure, his family has continued to receive threats. One of his cousins was allegedly attacked by the group seeking the author.

2.4 On 24 May 2000, the author applied for refugee status in Canada.
On 15 November 2000, his application was refused by the Immigration and Refugee Board (IRB) because of the implausibility and inconsistencies in his testimony. He alleges that he was poorly represented and that due to post-traumatic stress disorder, he did not present all the available evidence. Neither did he inform the authorities that he had been tortured and still suffers from the effects of such torture. Neither medical reports, nor any information had been provided on the alleged torture. On 21 December 2000, the author applied for leave to apply for judicial review of the IRB decision. On 30 April 2001, leave to apply for judicial review was denied by the Federal Court.

2.5 On 9 July 2001, the author applied for permanent residence in Canada on humanitarian and compassionate grounds. In order to be successful, the application must demonstrate that the person would suffer excessive hardship if he had to return to his country of origin to apply for permanent residence in Canada. On 7 July 2003, this application was dismissed.

2.6 On 4 December 2000, the author applied for consideration as a member of the class of Post-Determination Refugee Claimants in Canada (PDRCC). On 25 January 2003, he was informed that the PDRCC procedure no longer existed under the new Immigration and Protection Act adopted in 2001, and that it was replaced by the Pre-Removal Risk Assessment (PRRA) procedure. On 24 February 2003, the author made PPRA submissions on the risk of torture upon return to Pakistan. On 8 July 2003, his PRRA application was refused. He claims that he did not obtain this decision until March 2004. On 16 March 2004, he applied for leave to apply for judicial review of the PRRA decision and submitted a motion for a stay of deportation which was granted on 23 March 2004. On 7 July 2004, leave to apply for judicial review was denied by the Federal Court.

The complaint

3.1 The author claims a violation of articles 6 and 7 of the Covenant because, as a well-known Christian, he is at risk of kidnapping, detention, beatings, torture and execution, by the Sunni extremist groups if returned to Pakistan. He claims that he would not benefit from any protection from the police, which sympathize with the Sipah-E-Sahaba. He submits that the State party is unwilling to prevent religiously motivated violence and is unable to ensure legal redress after violent sectarian incidents.

3.2 The author claims a violation of article 18 because, if returned to Pakistan, he will be persecuted for his Christian beliefs and refusal to convert to Islam. He provides information from various sources pertaining to the persecution of Christians generally, and information from Christian churches in Pakistan confirming that he is in danger.

3.3 The author claims a violation of articles 2 and 14, because to him, the current PRRA procedure does not constitute an effective remedy. He submits that the risk assessment is made by immigration agents who have no competence in international human rights or legal matters generally. The decisions are not made by a competent, independent and impartial tribunal, and the decisions are frequently inconsistent with the jurisprudence of the Federal Court or the IRB. They seldom take into account the real country situation. In the overwhelming majority of cases, the procedure leads to negative decisions. The author also submits that the decisions are taken "on the enforcement side of immigration, with heavy pressure to produce deportation numbers from the top". There is no proper judicial control by the Federal Court.

State party's submission on admissibility and the merits

4.1 On 6 May 2005, the State party contested the admissibility and merits of the communication. Firstly, it argues that the author has not exhausted domestic remedies. He did not raise issues in the domestic proceedings that are now alleged in his communication. The State party submits that if he did not fully explain the torture at the initial hearing, he should have done so in the subsequent domestic proceedings. It recalls that in his application for leave for judicial review submitted to the Federal Court on 21 December 2000, he did not raise the issue of procedural fairness and natural justice. Nor did he raise this issue in the subsequent procedures. Regarding the author's explanation that he was badly represented, the State party submits that neglect owing to the author's counsel cannot be attributed to the State party.[1] Moreover, it argues that the author did not pursue an available domestic remedy when he submitted new evidence on the day of his scheduled removal from Canada. He could have requested an examination of the medical report he submitted to the Committee on 10 August 2004 and, consequently, a stay of his removal on the basis of this report. He could further have requested a second PRRA or application for permanent residence in Canada on humanitarian and compassionate grounds, based on the new evidence. As a result, the State party considers that the author has not exhausted domestic remedies.

4.2 The State party submits that the author has not sufficiently substantiated, for the purposes of admissibility, his allegations with respect to articles 2, 6 and 7 of the Covenant. With respect to the claim that the PRRA procedure is not an effective remedy under article 2, it argues that article 2, paragraph 2, describes the nature and scope of the obligations of the States parties, and that article 2, paragraph 3, does not recognize an individual right to a remedy. A right to a remedy arises only after a violation of the Covenant has been established. The claim is thus not substantiated and should be dismissed under article 3 of the Optional Protocol.

4.3 With regard to the claim under articles 6 and 7, the State party relies on the findings of the IRB with respect to the author's lack of credibility, and submits that it is not within the scope of the Committee to re-evaluate findings of credibility made by domestic courts or tribunals. The medical report of 10 August 2004 does not demonstrate that the author suffered from post-traumatic stress disorder at the time of his refugee hearing four years earlier, and thus does not explain why he did not testify about what happened to him in a forthright manner. It adds that he does not substantiate his new claims about the nature of the torture he suffered and the ongoing medical problems associated with that torture. As to the allegation that his family still is in danger in Pakistan, the State party notes that the author submits various new letters from family and friends in Pakistan and Canada. It argues that these letters are self-serving.

4.4 The State party submits that the author has not established that he would be at "personal risk" in Pakistan. It observes that the various reports of major human rights organizations submitted by the author refer primarily to the resurgence of sectarian violence directed against Shia Muslims in Pakistan, the targeting of the Ahmadi community, and the systemic targeted killings of people unrelated to the sectarian strife, particularly in Karachi. These reports do not explain or mention that Christians are particularly targeted by extremists. There have been many changes in Pakistan since the author's departure, which demonstrate the State's involvement in the protection of its citizens against actions taken by extremist factions such as the Sipah-E-Sahaba. The Government of Pakistan banned this organization in June 2002, as well as its successor, the Millat-e-Islamia, in November 2003. As to the allegation that the police collude with the Sipah-E-Sahaba (and its successor group), the State party observes that credible, first-hand information on such collusion is very scarce. It submits that the author has not substantiated the claim that he will be killed, tortured or subjected to cruel, inhuman or degrading treatment upon return to Pakistan.

4.5 With regard to the claim under article 7, the State party argues that the author's allegations do not establish a real, personal and foreseeable risk of torture or cruel, inhuman or degrading treatment. It submits that for applying article 7 in situations such as the author's, where the alleged agent of persecution is a non-State actor, a higher threshold of evidence is required. It argues that when the fear emanates from a non-state actor, "clear and convincing" proof of a State's inability to protect must be advanced.[2] In the present case, the author has not established, nor rebutted the presumption, that Pakistan is unwilling or unable to protect him from the Sipah-E-Sahaba.

4.6 The State party contends that the claims under articles 14 and 18 are incompatible with the provisions of the Covenant. Alternatively, these claims are inadmissible on the grounds of non-substantiation. With regard to the claim under article 14, it submits that refugee and protection determination proceedings do not fall within the scope of that provision. They are in the nature of public law and their fairness is guaranteed by article 13.[3] In the alternative, if the immigration proceedings fall within the scope of application of article 14, the State party submits that they satisfy the guarantees contained therein. The author's case was heard by an independent tribunal, at which he knew the case he had to meet, was represented by counsel, and had a full opportunity to participate, including testifying orally and making submissions. He had access to judicial review, as well as the right to make a humanitarian and compassionate application. Consequently, the State party submits that the claim under article 14 is incompatible *ratione materiae* with the provisions of the Covenant and should be dismissed under article 3 of the Optional Protocol.

4.7 With regard to the claim under article 18, the State party observes that the author does not allege that it has violated this provision. He is in fact alleging that his Christian faith could result in his being persecuted or ill-treated in Pakistan. However, Canadian authorities did not believe that he was in danger because of his religion. The State party recalls that article 18 does not prohibit a State from removing a person to another State that may not apply this provision. It invokes general comment 31[80] of 29 March 2004, where the Committee specified that States parties have an obligation not to expel a person from their territory "where there are substantial grounds for believing that there is a real risk of irreparable harm, such as that contemplated by articles 6 and 7 of the Covenant". The State party emphasises that the Committee has only exceptionally considered the extraterritorial application of rights guaranteed by the Covenant, thereby protecting the essentially territorial nature of the rights guaranteed therein. Consequently, it submits that the claim under article 18 should be declared inadmissible, as a violation of this provision is outside the competence *ratione materiae* of the Committee.

4.8 With regard to the author's general claims relating to the scope of judicial review by the Federal Court and the PRRA procedure, the State party notes that it is not within the scope of the Committee to consider the Canadian system in general, but only to examine whether in the present case Canada complied with its obligations under the Covenant. In any event, there are previous decisions of international tribunals, including the Committee itself, which considered the impugned processes to be effective remedies.[4]

Issues and proceedings before the Committee

5.1 Before considering any claim contained in a communication, the Human Rights Committee must, in accordance with rule 93 of its rules of procedure, decide whether or not the communication is admissible under the Optional Protocol to the Covenant.

5.2 The Committee has ascertained that the same matter is not being examined under another procedure of international investigation or settlement for the purposes of article 5, paragraph 2 (a), of the Optional Protocol.

5.3 As to the author's allegation that he was not afforded an effective remedy to contest his deportation, the Committee observes that the author has not substantiated how the Canadian authorities' decisions failed in this case thoroughly and fairly to consider his claim that he would be at risk of violations of articles 6 and 7 if returned to Pakistan. In these circumstances, the Committee need not determine whether the proceedings relating to the author's deportation fell within the scope of application of article 14 (determination of rights and duties in a suit at law).[5] This part accordingly is inadmissible under article 2 of the Optional Protocol.[6]

5.4 The Committee recalls that States parties are under an obligation not to expose individuals to a real risk of being killed or subjected to torture or cruel, inhuman or degrading treatment or punishment upon return to another country by way of their extradition, expulsion or refoulement.[7] The Committee must therefore decide whether there are substantial grounds for believing that, as a necessary and foreseeable consequence of his removal to Pakistan, there is a real risk that the author would be subjected to treatment prohibited by Articles 6 and 7.[8] The Committee notes that the Refugee Division of the Immigration and Refugee Board, after a thorough examination, rejected the asylum application of the author on the basis of lack of credibility and implausibility of the latter's testimony (see paragraph 2.3 above), and that the rejection of the Pre-Removal Risk Assessment application was based on similar grounds after another full examination. It further notes that in both cases, applications for leave to appeal were rejected by the Federal Court (see paragraphs 2.3 and 2.5 above). The author has not shown sufficiently why these decisions were contrary to the standard set out above, nor has he adduced sufficient evidence in support of a claim to the effect that he would be exposed to a real and imminent risk of violations of articles 6 and 7 of the Covenant if deported to Pakistan.

5.5 The Committee takes note of the psychological report submitted on 10 August 2004, in support of the claim that the author suffers from post-traumatic stress disorder. It observes that such a report should have been presented earlier to the national authorities and that it is not too late to request a new PRRA or application for permanent residence on humanitarian and compassionate grounds based on the new report. It accordingly concludes that the claim is also inadmissible as the author has not exhausted domestic remedies under article 2 of the Optional Protocol.[9]

5.6 With regard to the claim under article 18, the Committee takes notes of the author's submission that he was threatened by a man with a forced conversion to Islam in January 2000. However, it also takes note of the State party's contention that its obligation in relation to future violations of human rights by another State only arises in cases of a real risk of irreparable harm, such as that contemplated by articles 6 and 7.[10] In any case, it observes that even if non-State agents were motivated to subject the author to coercion in Pakistan that would impair his enjoyment of the freedom to have or adopt a religion or belief of his choice, he has not demonstrated that State authorities were unable or unwilling to protect him. The Committee accordingly concludes that his claim is also inadmissible as insufficiently substantiated under article 2 of the Optional Protocol.

6. The Human Rights Committee therefore decides:

(a) That the communication is inadmissible under article 2 of the Optional Protocol;

(b) That this decision shall be communicated to the State party and to the author.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the Committee's annual report to the General Assembly.]

Notes

[1] Communication No. 433/1990, *A.P.A. v. Spain*, Decision of inadmissibility adopted on 25 March 1994, para. 6.3.

[2] *Canada (Attorney General) v. Ward*, [1993] 2 S.C.R. 689, at 726.

[3] Communication No. 1051/2002, *Ahani v. Canada*, Views adopted on 29 March 2004, para. 10.8.

[4] Inter-American Commission on Human Rights, Organisation of American States, Report on the Situation of Human Rights of Asylum Seekers within the Canadian refugee determination system (2000). Human Rights Committee Views: communication No. 654/1995, *Adu v. Canada*, Decision of inadmissibility adopted on 18 July 1997, para. 6.2; communication No. 603/1994, *Badu v. Canada*, Decision of inadmissibility adopted on 18 July 1997, para. 6.2; and communication No. 604/1994, *Nartey v. Canada*, Decision of inadmissibility adopted on 18 July 1997, para. 6.2. Committee against Torture Decisions: communication No. 66/1997, *P.S.S. v. Canada*, Decision of inadmissibility adopted on 13 November 1998, para. 6.2; communication No. 86/1997, *P.S. v. Canada*, Decision of inadmissibility adopted on 18 November 1999, para. 6.3; communication No. 42/1996, *R.K. v. Canada*, Decision of inadmissibility adopted on 20 November 1997, para. 7.2; communication No. 95/1997, *L.O. v. Canada*, Decision of inadmissibility adopted on 19 May 2000, para. 6.5; and communication No. 22/1995, *M.A. v. Canada*, Decision of inadmissibility adopted on 3 May 1995, para. 4. European Court of Human Rights: *Vilvarajah and Others v. United Kingdom*, 14 E.H.R.R 218 (1991), para. 126.

[5] Communication No. 1051/2002, *Ahani v. Canada*, Views adopted on 29 March 2004, para. 10.5.

[6] Communication No. 1315/2004, *Daljit Singh v. Canada*, Decision on inadmissibility of 30 March 2006, para. 6.2.

[7] General comment No. 31[80], 29 March 2004, para. 12.

[8] See communication No. 706/1996, *T. v. Australia*, Views adopted on 4 November 1997, paras. 8.1 and 8.2; and communication No. 692/1996, *A.R.J. v. Australia*, Views adopted on 28 July 1997, para. 6.9.

[9] Communication No. 1315/2004, *Daljit Singh v. Canada*, Decision on inadmissibility of 30 March 2006, para. 6.3.

[10] General comment No. 31[80], 29 March 2004, para. 12.

X. Communication No. 1313/2004, *Castano v. Spain* (Decision adopted on 25 July 2006, eighty-seventh session)*

Submitted by:	Amalia Castaño López (represented by counsel, Mr. José Luis Mazón Costa)
Alleged victim:	The author
State party:	Spain
Date of communication:	24 June 2002 (initial submission)
Subject matter:	Refusal of authorization to open a pharmacy
Procedural issues:	Lack of substantiation; non-exhaustion of domestic remedies
Substantive issues:	Right to equality before the law
Article of the Covenant:	26
Articles of the Optional Protocol:	2; 5, paragraph 2 (b)

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 25 July 2006,

Adopts the following:

Decision on admissibility

1. The author of the communication, dated 19 June 2002, is Ms. Amalia Castaño López, who claims to be the victim of a violation by Spain of article 26 of the International Covenant on Civil and Political Rights. The Optional Protocol entered into force for Spain on 25 April 1985. The author is represented by counsel.

Factual background

2.1 On 28 May 1992, the Minister of Health of the Autonomous Community of the Region of Murcia authorized the opening of a pharmacy in the San Juan district of the town of Jumilla, at the request of the author. The owners of eight pharmacies applied for a review of this decision on the grounds that the pharmacy in question did not have a catchment area of 2,000 inhabitants as required for the opening of a pharmacy. Their application was rejected on 28 July 1993. They then submitted an application for judicial review to the High Court of Murcia, which was rejected on 30 March 1994. They subsequently submitted an appeal in cassation to the Supreme Court, which by judgement of 16 May 2000 annulled the decision of the High Court and revoked the authorization granted for the author's business.

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* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Nisuke Ando, Mr. Prafullachandra Natwarlal Bhagwati, Mr. Maurice Glèlè Ahanhanzo, Mr. Edwin Johnson, Mr. Walter Kälin, Mr. Ahmed Tawfik Khalil, Mr. Rajsoomer Lallah, Ms. Elisabeth Palm, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Ivan Shearer and Mr. Hipólito Solari-Yrigoyen

2.2 The Supreme Court based the revocation on the fact that article 3.1 (b) of Royal Decree No. 909/78 stipulates that one of the requirements for opening a pharmacy is that there should be a catchment area of at least 2,000 inhabitants; since at the time of application, 24 October 1990, there were only 1,511 inhabitants, the authorization should not have been granted. The Court indicated that the number of inhabitants in houses constructed after the date of the author's application could not be taken into account in the calculation.

2.3 The author submitted an application for *amparo* to the Constitutional Court on 16 June 2000, in which she claimed that the revocation of her pharmacy licence by the Supreme Court was the result of a manifest error and arbitrary decision by that Court, which had overstepped its mandate as a court of cassation, thereby violating her right to a fair hearing. The author acknowledges that she did not invoke the argument of discrimination in her application, since the Court itself, in a judgement of 24 July 1984, had declared that there was nothing in the Constitution to rule out the possibility of regulating and restricting the establishment of pharmacies. Specifically, the restriction on the establishment of pharmacies did not imply any violation of the right to equality before the law as set out in article 14 of the Constitution.

2.4 The application for *amparo* was rejected on 13 November 2000. The Constitutional Court considered that the Supreme Court had not overstepped its mandate as a court of cassation, since the Supreme Court had not re-evaluated the evidence but had simply considered that the criteria used to calculate the number of inhabitants for the purposes of the judgement were not in compliance with its jurisprudence.

The complaint

3.1 The author considers that the decision of the Supreme Court violates article 26 of the Covenant, since it applies discriminatory legislation which has no equivalent with respect to other commercial activities. No other business is subject to a restriction that requires the establishment of a new population centre or a certain number of inhabitants in such a centre. This legislation owes its existence to the influence of the powerful pharmacists' trade association in Spain. According to the author, there are no objective or reasonable grounds for the difference. The author maintains that she has the right to an effective remedy of *amparo* under article 2, paragraph 3 (a) of the Covenant, which should include permission to reopen her pharmacy and compensation for the damage resulting from its closure.

3.2 The author points out that the Government is authorized to restrict the number of pharmacies under the 1944 National Health Act, and later under Royal Decree No. 909/78. Under this legislation, there must be a population centre of a specific size before authorization to open a new pharmacy can be granted. According to the author, this legislation is discriminatory because: (i) the only commercial activity which has restrictions on its free exercise is pharmaceutical activity - no other commercial activity is subject to this type of restriction; and (ii) the restriction is only explained by historical reasons which are no longer justifiable.

The author cites a decision of the German Constitutional Court which, in 1958, declared that the law on pharmacies which restricted their establishment to areas with a certain population violated the Constitution because it was arbitrary and disproportionate.

The State party's observations on admissibility and on the merits, and the author's comments

4.1 In its observations of 25 November 2004, the State party indicates that the only violation alleged by the author is a violation of the right to equality before the law as set out in article 26 of the Covenant. However, this alleged violation was not mentioned in the application for *amparo* submitted to the Constitutional Court. That application referred to the alleged violation of the right to effective judicial protection from the Supreme Court in relation to the evaluation of the evidence. The State party consequently concludes that domestic remedies have not been exhausted.

4.2 The State party also points out that the decision of the Supreme Court simply applies the principle of equality, in finding that the contested judgement contravened its consistently upheld jurisprudence whereby the population must be calculated on the basis of the number of inhabitants at the time of the application to open the pharmacy, not when the case is being decided or judgement passed. Any other decision by the Supreme Court would have been a departure from precedent and would have involved applying different rules to the author than to other applicants for pharmacy licences, and would therefore have been in violation of the principle of equality. The State party also disagrees with the author's claim that the Supreme Court could not evaluate the evidence examined by the lower court because that would have involved overstepping its mandate, and points out that the scope of the cassation function covers the evaluation of the legality or illegality of the evidence produced in the lower court.

4.3 The State party concludes that the communication should be considered inadmissible as domestic remedies have not been exhausted, in accordance with article 2 of the Optional Protocol, and because it constitutes an abuse of the purpose of the Covenant, in accordance with article 3 of the Protocol.

4.4 As for the merits, the State party, in its observations of 13 April 2005, maintains that there has been no violation of the Covenant. It points out that a close inspection of all the decisions of the domestic administrative and judicial authorities reveals not the slightest trace of any invocation of the principle of equality or discriminatory treatment with regard to other professional activities. The purpose of the litigation has always been confined to fulfilment of the regulatory requirements.

4.5 The issue of granting pharmacy licences has given rise to numerous lawsuits in Spain. Some cases have been brought to the European Court of Human Rights, which has invariably declared them inadmissible.

4.6 The communication does not give a single reason why the rules on the exercise of different professions should be the same. There are obvious differences between opening a pharmacy and other professional activities. The author's case refers not only, or even mainly, to the exercise of a professional activity, but to the establishment of a commercial business in a country such as Spain, in which the majority of a pharmacy's activities consist of selling prescription drugs financed by the public health system. It cannot be claimed that this activity, which has much in common with a public service and an ordinary commercial retail activity, is equivalent to the exercise of another professional activity. In addition, the communication fails to mention or offer any proof that the author has been discriminated against on grounds of race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

5.1 In her comments of 22 June 2005, the author reiterates that it was pointless invoking the violation of the principle of equality in the regulations on opening a pharmacy, since the Constitutional Court had ruled negatively on that issue in a judgement of 24 July 1984. In that judgement, the Court examined the question of constitutionality raised by the Regional High Court of Valencia with regard to the contradiction between the restrictions on opening a pharmacy based on population and distance criteria and the right to equality before the law as set out in article 14 of the Constitution.

5.2 In subsequent decisions, the Supreme Court rejected similar allegations and recognized the validity of the rules on opening pharmacies as set out in Royal Decree No. 909/78. In conclusion, there was no possibility of the allegation of discrimination being upheld, and therefore the exhaustion of domestic remedies that were bound to be unsuccessful cannot be required.

5.3 The author maintains that the requirements under Spanish legislation for opening a pharmacy are illogical and that the State party has not explained their purpose. The only reason these requirements are in place is because of the power of the lobby established by owners of authorized pharmacies, which violates the principle of equality before the law.

Issues and proceedings before the Committee

6.1 Before considering any claim contained in a communication, the Human Rights Committee must, in accordance with article 93 of its rules of procedure, decide whether or not the communication is admissible under the Optional Protocol to the Covenant.

6.2 In accordance with article 5, paragraph 2 (a), the Committee has ascertained that the matter has not been examined under another procedure of international investigation or settlement.

6.3 The Committee notes the State party's affirmation that the communication is inadmissible because domestic remedies have not been exhausted, as the author did not invoke the violation of the right to equality before the Constitutional Court. The Committee notes, however, that the Court had already ruled negatively on that issue in a similar case. The Committee reiterates its jurisprudence that when the highest domestic court has ruled on the subject of a dispute, thereby eliminating any prospect of a successful appeal to the domestic courts, the author is not required to exhaust domestic remedies for the purposes of the Optional Protocol. The Committee therefore concludes that the requirements of article 5, paragraph 2 (b), of the Optional Protocol have been met in the case of the present communication.

6.4 Nonetheless, the Committee considers that the author, for the purposes of admissibility, has failed to substantiate her complaint under article 26 of the Covenant. There is no evidence in the author's allegations to suggest that there has been any discrimination on grounds of race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Accordingly, the Committee considers that the author's claim of discrimination under article 26 has not been substantiated for the purposes of article 2 of the Optional Protocol.

7. The Human Rights Committee therefore decides:

(a) That the communication is inadmissible under article 2 of the Optional Protocol;

(b) That this decision shall be communicated to the author of the communication and the State party.

[Adopted in English, French and Spanish, the Spanish text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian, as part of the Committee's annual report to the General Assembly.]

Y. Communication No. 1315/2004, *Singh v. Canada* (Decision adopted on 30 March 2006, eighty-sixth session)*

Submitted by:	Mr. Daljit Singh (represented by counsel)
Alleged victim:	The author
State party:	Canada
Date of communication:	21 September 2004 (initial submission)
Subject matter:	Deportation to country of origin with risk of torture
Procedural issues:	Interim measures/Request by State party to lift interim measures
Substantive issues:	Risk of torture and death, review of expulsion order, unfair "suit at law", and ineffective remedy
Articles of the Covenant:	2, 6, 7, 13, 14
Articles of the Optional Protocol:	1 and 2

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 30 March 2006,

Adopts the following:

Decision on admissibility

1.1 The author of the communication is Mr. Daljit Singh, an Indian citizen, currently awaiting deportation from Canada. He claims that his deportation would result in violations, by Canada, of his rights under articles 2, 6, 7, 13 and 14 of the International Covenant on Civil and Political Rights. He is represented by counsel.

1.2 On 5 November 2004, the Human Rights Committee, through its Special Rapporteur on new communications, requested the State party, pursuant to rule 92 of its rules of procedure, "not to deport the author before it provides the Committee with information as to whether it intends to remove the author to India, and before providing to the Committee its observations on the communication, pursuant to Rule 97 (old 91) of the Rules of Procedure." On 9 November 2004, following a request for clarification, the Committee requested the State party, "not to deport Mr. Daljit Singh to India before the State party has made its observations either on admissibility or the merits of the author's allegations and the Committee has acknowledged receipt".

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* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Nisuke Ando, Mr. Prafullachandra Natwarlal Bhagwati, Ms. Christine Chanet, Mr. Maurice Glèlè Ahanhanzo, Mr. Edwin Johnson, Mr. Walter Kälin, Mr. Ahmed Tawfik Khalil, Mr. Rajsoomer Lallah, Mr. Michael O'Flaherty, Ms. Elisabeth Palm, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Ivan Shearer, Mr. Hipólito Solari-Yrigoyen, Ms. Ruth Wedgwood and Mr. Roman Wieruszewski.

The facts as presented by the author

2.1 The author lived in the village of Sonet, Ludhiana District, Punjab. He is the owner of a trucking company and owned four trucks. He is married and has two children. His wife and children remain in the village of Sonet. His mother, brother, sister and their respective families all live in British Columbia, Canada. His father died on 1 June 1999 in British Columbia.

2.2 On 15 September 1998, the author's brother-in-law and the driver of one of the author's trucks were stopped by police in Jammu and were accused of supporting a militant group. The author was arrested at 5 a.m. the following day at his home and detained by police. He claims that while in detention he was beaten and tortured. On 17 September, he was released thanks to the intervention of the mayor (Sarpanch), of the village, the village council and the president of the truckers' union, on the condition that he would report to the police about the militants' activities. A bribe was paid for his release. The author claims that his brother-in-law and his driver were detained for one week and tortured. They were released on the same conditions as he. He claims that all three of them had medical treatment after their release.

2.3 In April 1999, the author was arrested again because he was suspected of helping the militants transport arms, munitions and explosives. After two days of detention, during which he claims that he was tortured again, his release was granted upon the intervention of the village mayor (Sarpanch), with the condition that he report monthly to the police station with information regarding his driver and other militants. He claims that he underwent medical treatment following his release and suffers from post-traumatic stress disorder as a result. Fearing for his life, he decided to flee India. He claims that his wife and son were tortured in April 2003 after his departure.

2.4 On 3 June 1999, the author applied for and received a tourist visa to enter Canada to attend his father's funeral. On 6 June 1999, he arrived in Canada and on 30 June 1999, he applied for asylum. On 15 December 2000, his refugee claim was heard by the Refugee Division of the Immigration and Refugee Board ("the Board"), which decided, on 28 February 2001, that the author was not a Convention refugee because his testimony was implausible. His account of events was found not to have been credible.

2.5 On 10 July 2001, the Federal Court denied the author leave to apply for judicial review of the Board's decision. On 5 November 2003, the author's Pre-Removal Risk Assessment Application ("PRRA") was assessed negatively. On 5 November 2003, his application for permanent residence in Canada on humanitarian and compassionate grounds was denied. On 18 December 2003, the author applied for leave to apply for judicial review of the PRRA decision and a motion for stay of removal. On 19 January 2004, the Federal Court granted the stay of removal until a decision on the leave to apply for judicial review was made. On 3 May 2004, leave to apply for judicial review was denied by the Federal Court.

The complaint

3.1 The author claims that, if he is removed to India, the State party would be in violation of articles 6, and 7 of the Covenant, to the extent that he will be subjected to torture, have no possibility of obtaining medical treatment, and possibly lose his life. In support of his claim, he refers to the torture he allegedly suffered in 1998 and 1999, and the allegation that his family members were beaten and harassed by the police since his departure.

3.2 The author claims that domestic proceedings leading to the removal order also violated articles 13, 14, and 2, of the Covenant. He claims that article 13 was violated by the "procedures" employed in this case and that the PRRA procedure is contrary to the Canadian Charter for Rights and Freedoms. He claims a violation of article 14, as the domestic authorities failed to consider carefully the evidence submitted in support of his case. Medical reports and photographs establishing that he and some of his family members are victims of torture, affidavits from the mayors of the surrounding villages about the problems he had had with the police, and a report following an investigation from the Sikh Human Rights Group into the incidents in question were not considered by the domestic authorities. In addition, information from other sources on the general human rights situation in India was not considered including, a Human Rights Watch Report of 10 June 2003, and an academic journal. The Board's and the PRRA's analysis of the human rights situation in India is said to be inaccurate. The author requests the Committee to review the evidence he submitted to the Federal Court, which in his view is sufficient proof of his current psychological state and the risk he will face if removed.[1]

3.3 The author also claims a violation of articles 14 and 2, as the legal remedies available to him are ineffective. He alleges that there is no independent scrutiny in Canada of the risk of torture that asylum seekers may face upon return to their country of origin, and that procedures are administrative and result in summary decisions of deportation. PRRA officers are not independent, since they are employees of the Ministry which wishes to deport the applicant, and there is no effective judicial control of their decisions. An applicant must first apply for leave to appeal to the Federal Court and if granted the Court may only review errors of law. The author refers to the judgement of the Federal Court in a separate case, in which the Court set aside the decision of the immigration officer as it was considered to have been unreasonable and sent the matter back for reconsideration, to demonstrate that the PRRA procedure is ineffective He claims that the effectiveness of the judicial remedies in Canada was severely criticized by the Inter-American Commission of Human Rights, in a report dated 18 September 2001, on the situation of human rights of Asylum Seekers within the Canadian refugee Determination system (2000).

State party's submission on admissibility and merits

4.1 On 22 December 2004, the State party contested the admissibility and merits of the communication. It submits that although it is of the view that the author has not exhausted domestic remedies, it is not contesting admissibility on this ground, given the lack of merit of the author's claims and the State party's wish to have the case dealt with as soon a possible.

4.2 The State party argues that the author has not sufficiently substantiated his claims under articles 6 and 7, for the purposes of admissibility. He confines himself to broad allegations that he would suffer a severe risk of torture based on the same facts and evidence as presented to Canadian tribunals. The State party relies on the findings of the Board and PRRA officer with respect to the author's lack of credibility, and submits that it is not within the scope of the Committee to re-evaluate findings of credibility or to weigh evidence or re-assess findings of fact made by domestic courts or tribunals.

4.3 If the Committee wishes to re-evaluate the findings with respect to the author's credibility, the State party submits that his testimony about the relevant events contained contradictions, inconsistencies and improbabilities. It provides examples of such contradictions including the following: part of the author's written account was strikingly similar, in parts identical, to accounts from other unrelated claimants, also from India; the author's oral and written accounts about his employee, whom police allegedly accused of being involved with the militants, were contradictory; the allegations concerning his brother-in-law were contradictory and lacked credibility, in particular the allegation that although he had been caught with arms, explosives, and fake currency in his truck, he was released without charge, and continues to live in India; and similarly that the author's son, who was a registered owner of one of the trucks, had also been able to remain in India.

4.4 As to a photo the author provided to support the claim that his wife and son were tortured in April 2003, which was presented for the first time to the PRRA officer, the State party submits that the officer did not accord this photo any weight, considering that it could have been any woman and any young man on a hospital bed covered in bandages. Nor was it proof that even if the photo depicted the author's relations, that they had been tortured. The State party argues that if the author was able to obtain a photo of them in hospital, he could also have obtained a medical report corroborating their injuries, which he failed to do. If they had been tortured, the State party questions why they continue to live in their home town and have neither fled to another part of India nor out of the country altogether.

4.5 As to the medical report submitted to the Board, despite the conclusion that "this man's objective physical findings and his subjective allegations of torture are not incompatible", the Board did not attach probative value to the medical report because of its negative assessment of the credibility of the author and contradictions in his story about the origins of scars on his back. As to the psychological report, although the psychologist concluded that her analysis led her to believe that it was completely plausible that her diagnosis of post traumatic stress disorder is a result of the impact of the traumatizing events the author alleged to have undergone, the Board considered that there was no direct evidence, other than his own allegations, that he was exposed to traumatic events. Since the allegations were not found to be credible by the Board, the psychologist's report which was based on those allegations was not given probative value. The State party submits that doubts about the most important aspects of the author's story so seriously undermine his credibility that his allegations, are insufficient to substantiate his claim that he would be at risk of death or cruel and unusual treatment if returned to India.

4.6 As to the human rights situation in India, the author has not established that he would be at "personal risk" in India. Even if the human rights situation in India on occasion gives rise for concern, it is not sufficient by itself to be the basis of a violation of the Covenant if the author returns there. However, in the event that the Committee wishes to consider the human rights situation in India, the State party submits that the situation does not provide corroboration of the author's allegations. The human rights situation in India pertaining to Sikhs has improved so much that there is negligible risk of torture or any other ill-treatment on the part of police towards Sikhs. The State party refers to the country reports relied upon by the PRRA officer (Danish Immigration Service Report of 2001 and US Country Report 2002), stating that the situation of Sikhs in the Punjab is now stable and that only those considered to be high-profile militants may be at risk. The State party submits that it has taken into consideration the other reports submitted by the author including a 1999 report entitled "Lives Under Threat", which describes the present persecution of Sikhs in India, as well as a 2003 report by SikhSpectrum.com monthly which discusses judicial impunity for disappearances in the Punjab. The State party submits that the fact that abuses of human rights occurred in the past and impunity may continue in some cases does not render the author's story credible or substantiate his allegations. As to the judgement of the Federal Court in the case of Singh Shahi, in which the Court set aside the decision of the immigration officer and sent the matter back for reconsideration, the State party argues that this case demonstrates that the process is effective, as cases that warrant reconsideration will be reviewed. In this regard, the State party refers to the decision of the Committee against Torture, which having considered the case of B.S.S., did not find a violation of the Convention, and in fact commented on the effectiveness of the judicial remedies in Canada.[2]

4.7 The State party submits that the author has not substantiated his allegation, even on a prima facia basis, that he would be killed if returned to India. On article 7, the State party submits that the allegations do not establish risk at a level beyond mere "theory or suspicion" and do not establish a real and personal risk of torture or cruel, inhuman or degrading treatment or punishment. In the alternative, if it is suspected that the author was tortured in the past, which the State party denies, it was not in the recent past and is not by itself proof of a risk of torture in the future.

4.8 In the alternative, the State party argues that if the author does face a risk of death, torture or cruel, inhuman or degrading treatment or punishment if he returns to the Punjab, he has not shown that he does not have an internal flight alternative. Even though he may face hardship should he not be able to return home, that hardship would not amount to any treatment in violation of the Covenant.[3] Finally, even if all the contradictions in his story were overlooked and his evidence were regarded as credible, the fact that he allegedly fears mistreatment by the police if returned to India, and documentary evidence shows that at the present time this type of abuse is only directed against high profile militants. As the author is not a high profile militant, he is not someone who is likely to be targeted by the police.

4.9 As to the claims under articles 2, 13 and 14, the State party submits that these claims are inadmissible on the grounds of incompatibility with the provisions of the Covenant, pursuant to article 3 of the Optional Protocol. It invokes the Committee's jurisprudence to demonstrate that article 2 does not recognize an independent right to a remedy but arises only after a violation of a Covenant right has been established. In the alternative, the Covenant rights alleged to have been violated therein are rights protected in the Canadian Charter of Rights and Freedoms. It is argued that article 13 does not apply to the author, as he was determined not to be at risk in India, is subject to a lawful removal order and is not thus "lawfully in the territory" in Canada. The State party invokes the Committee's general comment No. 15 and its finding in *Maroufidou v. Sweden*,[4] in which article 13 is considered to regulate only the procedure and not the substantive grounds for expulsion, and its purpose is to prevent arbitrary expulsions. The author has not established that the proceedings leading to the removal order against him were not in accordance with lawful procedures, or that the Canadian Government abused its power.

4.10 The State party submits that refugee and protection determination proceedings do not fall within the scope of article 14. They are in the nature of public law, the fairness of which is guaranteed by article 13.[5] In the alternative, if the immigration proceedings are considered to be the subject of article 14, the State party argues that they satisfy the guarantees contained therein. The author's case was heard by the Refugee Division of the Immigration and Refugee Board, an independent tribunal. He knew the case he had to meet, was represented by counsel, and had a full opportunity to participate, including testifying orally and making written submissions. He had access to judicial review, as well as the right to make a humanitarian and compassionate application.

4.11 As to the author's general claims relating to the scope of judicial review by the Federal Court and the PRRA procedures, the State party notes that it is not within the scope of the Committee to evaluate the Canadian system in general, but only to examine whether in the present case Canada complied with its obligations under the Covenant. In any event, there are previous decisions of international tribunals, including this Committee, which considered the impugned processes to be effective remedies.[6] While the Committee against Torture recently questioned whether the PRRA process could be effective in the case of one complainant,[7] due to its assumption that the risk assessment would be limited to new evidence in that case, in the current case, the PRRA officer considered all of the submissions and evidence presented by the author, including new evidence as well as that previously submitted to the Board, in her assessment of the risk he might face upon return.

4.12 If the Committee were to find the communication admissible, the State party requests the Committee to find the case without merit.

Author's comments

5.1 On 20 March and 3 September 2005, the author commented on the State party's submission. He sets out the historical situation in the Punjab from the 1980s onwards in great detail to demonstrate that the author would be at risk of torture if returned there. On the alleged contradictions in his story, the author submits that it is not unusual that his story might resemble the stories of other Sikh truck drivers, as there is a high number of Sikhs in the trucking industry and many of them have been detained and tortured for giving rides to militants, or because of suspicion that they were carrying ammunition for the militants. He denies that he provided contradictory evidence on his employee and submits that his brother-in-law is in hiding and that his son has faced severe harassment. Despite the State party's claim to the contrary, the author insists that the pictures of the marks on his back were presented to the Board. He denies that no new evidence was presented to the PRRA and refers to the affidavits of the four local mayors (Sarpanch) relating to the danger he would suffer on return and the detention of his wife and son.

5.2 As to his claims of torture, the author submits that according to the evidence presented before the Indian Human Rights Commission, the Indian courts and international human rights organizations, the detention and torture he has described is consistent with the *modus operandi* of the Punjab police. The author notes that quotations from the Danish Immigration Service report referred to by the domestic authorities do not reflect the true conclusions of the report. Arbitrary arrests continue to take place, individuals other than those who are high profile are at risk, and there is no clear internal flight alternative. Other reports, including the Amnesty International Report of 2003, attest to this claim. The author provides further information to demonstrate the inadequacy of the system of review of asylum claims under the PRRA and the Federal Court.

Issues and proceedings before the Committee

6.1 Before considering any claim contained in a communication, the Human Rights Committee must, in accordance with rule 93 of its rules of procedure, decide whether or not the communication is admissible under the Optional Protocol to the Covenant.

6.2 As to the author's allegation that he was not afforded an effective remedy to contest his deportation, the Committee observes that the author has not substantiated how the Canadian authorities' decisions failed in this case thoroughly and fairly to consider his claim that he would be at risk of violations of articles 6 and 7 if returned to India. In these circumstances, the Committee need not determine whether the proceedings relating to the author's deportation fell within the scope of application of articles 13 (as a decision upon which an alien lawfully present is expelled) or 14 (determination of rights and duties in a suit at law).[8] This part accordingly is inadmissible under article 2 of the Optional Protocol.

6.3 The Committee recalls that States parties have the obligation not to expose individuals to a real risk of being killed or subjected to torture or cruel, inhuman or degrading treatment or punishment upon return to another country by way of their extradition, expulsion or refoulement.[9] The Committee must therefore decide whether there are substantial grounds for believing that, as a necessary and foreseeable consequence of his removal to India, the author would be subjected to treatment prohibited by Articles 6 and 7.[10] The Committee notes that the Refugee Division of the Immigration and Refugee Board, after thorough examination, rejected the asylum application of the author on the basis of lack of credibility the implausibility of his testimony and supporting evidence (para. 2.4 above) and that the rejection of this Pre-Removal Risk Assessment application was based on similar grounds. It further notes that in both cases applications for leave to appeal were rejected by the Federal Court (para. 2.5 above). The author has not shown sufficiently why these decisions were contrary to the standard set out above, nor has he adduced sufficient evidence in support of a claim to the effect that he would be exposed to a real and imminent risk of violations of articles 6 and 7 of the Covenant if deported to India. The Committee accordingly concludes that his claim is also inadmissible as insufficiently substantiated under article 2 of the Optional Protocol.

7. The Human Rights Committee therefore decides:

(a) That the communication is inadmissible under article 2 of the Optional Protocol;

(b) That this decision shall be communicated to the State party and to the author.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the Committee's annual report to the General Assembly.]

Notes

[1] The author provides the following: information on the general human rights situation in India from NGOs; an affidavit from an Indian lawyer corroborating his story; a medical report of 31 May 2000 which concludes "this man's objective physical findings and his subjective allegations of torture are not incompatible"; a psychological report of 20 June 2000, which concludes that it is plausible that the post traumatic stress disorder suffered by the author results from the traumatic events reported by him, in particular torture in detention; photocopies of photographs of the author's back (too difficult to assess); and affidavits from mayors of villages in his region corroborating his story.

[2] *B.S.S v. Canada*, communication No. 183/2001, Views adopted on 12 May 2004.

[3] In this regard, it refers to the decision of the Committee against Torture, in *B.S.S v. Canada*, communication No. 183/201, Views adopted on 12 May 2004, in which it found that although resettlement outside the Punjab would constitute a considerable hardship for the complainant the mere fact that he may not be able to return to his family and his home village does not amount to torture within the meaning of article 1 of the Convention.

[4] Communication No. 58/1979, Views adopted on 9 April 1981.

[5] In this regard, it refers to *Y.L. v. Canada*, communication No. 112/1981 (1986), Decision adopted on 8 April 1986, *V.M.R.B. v. Canada*, communication No. 236/1987, Decision adopted on 18 July 1988, and *Ahani v. Canada*, communication No. 1051/2002, Views adopted on 29 March 2004.

[6] Inter-American Commission on Human Rights, Organisation of American States, Report on the Situation of Human Rights of Asylum Seekers within the Canadian refugee determination system (2000). Human Rights Committee Views: *Abu v. Canada*, communication No. 654/1995, Views adopted on 18 July 1997; *Badu v. Canada*, communication No. 603/1994, Views adopted on 18 July 1997, *Nartey v. Canada*, communication No. 604/1994, Views adopted on 18 July 1997. Committee against Torture Decisions: *P.S.S. v. Canada*, communication No. 66/1997, Views adopted on 13 November 1998; *P.S. v. Canada*, communication No. 86/1997, Views adopted on 18 November 1999; *R.K. v. Canada*, communication No. 42/1996, Views adopted on 20 November 1997; *L.O. v. Canada*, communication No. 95/1997, Views adopted on 19 May 2000; *M.A. v. Canada*, communication No. 22/1995, Views adopted on 3 May 1995. European Court of Human Rights: *Vilvarajah and Others v. United Kingdom*, 14 E.H.R.R-218 (1991), para. 126.

[7] See *Falcon Rios v. Canada*, communication No. 133/1999, Views adopted on 23 November 2004.

[8] See Committee's Views on communication No. 1051/2002, *Ahani v. Canada*, para. 10.5.

[9] See general comment No. 20[47], 1992, para. 9.

[10] See Views on communication No. 706/1996, *T. v. Australia*, 4 November 1997, paras. 8.1 and 8.2; No. 692/1996, *A.R.J. v. Australia*, 28 July 1997, para. 6.9

Z. Communication No. 1323/2004, *Lozano v. Spain*
(Decision adopted on 28 October 2005, eighty-fifth session)*

Submitted by:	Amando Lozano Aráez, Francisco Aguilar Martínez, José Lozano Rodríguez, Felicita Baño Franco and Juana Baño Franco (represented by counsel, Mr. Jose Luis Mazón Costa)
Alleged victims:	The authors
State party:	Spain
Date of communication:	4 November 2004 (initial submission)
Subject matter:	Aggravation of sentence on appeal without further possibility of having conviction reviewed by a higher court
Procedural issues:	Incompatibility of claim *ratione materiae*
Substantive issues:	Right to have conviction and sentence reviewed by a higher tribunal according to law
Articles of the Covenant:	14, paragraph 5
Articles of the Optional Protocol:	3

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 28 October 2005,

Adopts the following:

Decision on admissibility

1. The authors of the communication, dated 4 November 2002, are Armando Lozano Aráez, Francisco Aguilar Martínez, José Lozano Rodríguez, Felicita Baño Franco and Juana Baño Franco. They claim to be victims of a violation of article 14, paragraph 5, of the Covenant by Spain. The Optional Protocol entered into force for Spain on 25 April 1985. The authors are represented by counsel, Mr. Jose Luis Mazón Costa.

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* The following members of the Committee participated in the examination of the present communication: Mr. Nisuke Ando, Mr. Prafullachandra Natwarlal Bhagwati, Mr. Alfredo Castillero Hoyos, Ms. Christine Chanet, Mr. Maurice Glèlè Ahanhanzo, Mr. Edwin Johnson, Mr. Walter Kälin, Mr. Ahmed Tawfik Khalil, Mr. Rajsoomer Lallah, Mr. Michael O'Flaherty, Ms. Elisabeth Palm, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Ivan Shearer, Mr. Hipólito Solari-Yrigoyen, Ms. Ruth Wedgwood and Mr. Roman Wieruszewski.

Factual background

2.1 On 26 February 1991, the authors created a limited company, "A.B.L. Alimentación, S.L.", domiciled in Spain, with the trade purpose of producing and repairing canned food machinery. In November 1993, this company incurred debts amounting to almost 8,000,000 PTA (€48,000 approx.) with two other commercial companies, "Comercial Stainless Steel, S.A." and "Comercial Industrial García, S.A." (creditor companies). In March 1994, the authors created a new commercial company with the same trade purpose, the same premises, machinery and workers as the former company. According to the judgement of the Court of First Instance of Murcia, through this operation, the authors "emptied the previous company of every content, asset and activity without liquidating or dissolving it".

2.2 On 25 May 2001, the Criminal Court of First Instance (*Juzgado de lo Penal*) of Murcia, convicted the authors for concealment of property to the prejudice of creditors (*alzamiento de bienes*) to four months imprisonment. The judgement made no reference to the author's civil liability.

2.3 The sentence was appealed by the representatives of both creditor companies, which claimed inclusion of civil liability of the authors for the amounts due. The public prosecutor adhered to this appeal. On 20 October 2001, the Court of Appeal (*Audiencia Provincial*) of Murcia upheld the conviction of the authors and additionally declared their liability, considering that, according to existing evidence, the debt was due and payable, and sentenced them to pay 9,163,330 PTA (€55,000 approx.) to the creditor companies as compensation for damages.

2.4 The authors acknowledge that they did not file an appeal (*amparo*) in the Constitutional Court. They consider this remedy to be futile, because the Constitutional Court has ruled that the fact that an accused acquitted at the first instance who is later convicted by a court of second instance, without possibility to appeal, is not contrary to article 14, paragraph 5, of the Covenant. The jurisprudence of the Constitutional Court relies on the assumption that the judges of the Court of Appeal have a better insight, experience and skills than those of the lower court.

The complaint

3. The authors claim a violation of article 14, paragraph 5, of the Covenant, because the Court of Appeal aggravated their conviction, depriving them of the possibility of having this conviction reviewed by a higher tribunal. According to article 847 of the Spanish Criminal Procedure Act (*Ley de Enjuiciamiento Penal*), no appeal is possible against the judgements of the Court of Appeal (*Audiencia Provincial*). The authors contend that, unlike other States parties, Spain has not made any reservation to article 14, paragraph 5, of the Covenant.

Consideration of the Committee

4.1 Pursuant to rule 93 of its rules of procedure, before considering any claim contained in a complaint, the Human Rights Committee must determine whether it is admissible under the Optional Protocol to the Covenant on Civil and Political Rights.

4.2 The Committee has ascertained, as required under article 5, paragraph 2 (a), of the Optional Protocol, that the same matter is not being examined under another procedure of international investigation or settlement.

4.3 With regard to the alleged violation of article 14, paragraph 5, the Committee recalls that this provision enshrines the right to appeal a criminal conviction to a higher court. The Committee notes that the Court of Appeal reviewed and confirmed the authors' criminal conviction, which was not imposed at the appellate level but at first instance level. The imposition of compensation for damages does not amount to an aggravation of the criminal conviction but is of civil nature. It, therefore, falls outside the scope of article 14, paragraph 5. Accordingly, the Committee finds that this claim is incompatible *ratione materiae* with article 14, paragraph 5, or the Covenant, and declares it inadmissible under article 3 of the Optional Protocol.

4.4 The Human Rights Committee therefore decides:

(a) That the communication is inadmissible under article 3 of the Optional Protocol;

(b) That the decision be transmitted to the State party and to the author.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the Committee's annual report to the General Assembly.]

AA. Communication No. 1331/2004, *Dahanayake et al. v. Sri Lanka* (Decision adopted on 25 July 2006, eighty-seventh session)*

Submitted by: Ms. Susila Malani Dahanayake and 41 other Sri Lankan citizens (represented by the NGO "International Public Interest Defenders")

Alleged victims: The authors

State party: Sri Lanka

Date of communication: 21 November 2004 (initial submission)

Subject matter: Expropriation, preliminary impact assessments

Procedural issues: Exhaustion of domestic remedies, same matter

Substantive issues: Equal protection of the law, right to receive information, unlawful interference with the home

Articles of the Covenant: 19, paragraph 2, and 26

Articles of the Optional Protocol: 2 and 5, paragraph 2 (a) and (b)

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 25 July 2006,

Adopts the following:

Decision on admissibility

1.1 The authors of the communication are the following: Susila Malani Dahanayake, A.A. Hema Mangalika, P.M. Koralage, A.K. Maginona, Arambawelage Weerapala, Jayawathie Abeygoonewardene, M.P. Gamage Premadasa, Tiranagamage Dayaratne, G.D. Dayawanse Devapriya, W. Don Leelawathie, Geeganage Nandawathie, Brahamanage Chandrasiri, Veditantirige Kusuma, T.L. Sarath Chandrasiri, D. Liyanage Dhanapala, Geeganage Gunadasa,

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* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Nisuke Ando, Mr. Prafullachandra Natwarlal Bhagwati, Mr. Alfredo Castillero Hoyos, Mr. Maurice Glèlè Ahanhanzo, Mr. Edwin Johnson, Mr. Walter Kälin, Mr. Ahmed Tawfik Khalil, Mr. Rajsoomer Lallah, Mr. Michael O'Flaherty, Ms. Elisabeth Palm, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Ivan Shearer, Mr. Hipólito Solari-Yrigoyen and Mr. Roman Wieruszewski.

The text of an individual opinion co-signed by Committee members Mr. Walter Kälin and Mr. Hipólito Solari-Yrigoyen is appended to the present document.

Geeganage Karunadasa, A. Vithanage Wickramapala, Meepe Gamage Kulasena, T. Salamon Appuhamy (deceased), Meepe Gamage Paulis, M.V. Mahindaratne, A.A Sunanda, S.A. Wanigaratne, C Kumudini Liyanage, M.T Isawathie (deceased), M.G Sarath Wickramaratne, S.K.A Ariyawathie, H.G. Kulawathie, M.V. Chandradasa, D. Dayawathie, Karunawathie Samarasekara, Podinona Samarasekara, G. Karunadasa, H.G.D. Asika Shyamali, Maliaspakoralage Ariyawathie, N.V. Samithra, M. Vithanage Dharmasena, Meepe Gamage Piyaratne, G. Sirisena Silva, Buddhadasa Ihalawaithana, and M.V. Punyawathie (deceased after the communication was submitted), all Sri Lankan citizens currently residing in Sri Lanka. They claim to be victims of violations by Sri Lanka[1] of articles 6, 19, paragraph 2, and 26, of the International Covenant on Civil and Political Rights. The authors are represented by an NGO, the International Public Interest Defenders.

1.2 Two requests for interim measures that the State party should refrain from evicting the authors and their families from their land and homes or "involuntarily resettling" them, were denied by the Special Rapporteur on new communications.

Factual background

2.1 At the time of submission of the communication, the authors were landowners and long term residents of the villages of Ihalagoda, Walahanduwa, Niyagama, Ambagahawila, Pinnaduwa, Godawatte, Narawala and Ankokkawala, in the area of Akmeemana, in the southern part of Sri Lanka. It is alleged that they also represent the other affected persons of the above villages. For many generations they and those they represent lived in this area without disturbance.

2.2 In the early to mid-1990s, the Road Development Authority (RDA)[2] proposed the construction of, and prepared possible trajectory for, a 128 km long expressway from Colombo, in the western part, to Matara, in the southern part of Sri Lanka. Under the National Environmental Act No. 47 of 1980, as amended by Acts No. 56 of 1988 and 53 of 2000 (NEA), the proposed expressway was required to undergo an Environmental Impact Assessment (EIA) process, in order to analyse and assess the environmental, social, financial and agricultural impact. The EIA process included "scoping"[3] of the project, the identification and study of alternatives, the publication of an EIA report in respect of the project, a period for public comment, and technical review and approval by the Central Environmental Authority (CEA).[4] The University of Moratuwa, Sri Lanka, prepared the EIA report on the expressway project. Two possible trajectories, namely the "Combined Trace" and "Original Trace" were considered in the EIA report for the Expressway. None of these trajectories ran through the authors' properties or villages. Of the two, the EIA report recommended the "Combined Trace" as the most appropriate financial, social, agricultural and environmentally sound alternative.

2.3 On 23 July 1999, the CEA informed the RDA, which had proposed the project, of its decision to approve the expressway, subject to a number of conditions, including that the expressway should be routed in such a manner as to avoid running through the Koggala and Madu Ganga wetlands, and that the final route should minimise relocation of individuals. Any amendment of the project required a new approval. The conditions could have been satisfied by shifting the "Combined Trace" by 200 meters, on a distance of about 1 kilometre, or by building it on concrete pillars, as the EIA report recommended.

2.4 Instead of complying with the conditions of the CEA, the RDA established a completely new route, called the "Final Trace". This route affects almost ten times as many individuals as the "Combined Trace" in the same area. It runs through a large number of properties, including the authors' houses and land, which will be compulsorily acquired, while the authors will be subjected to involuntary resettlement. The authors were neither sent an official written notice of the change of the proposed route, nor given any opportunity to comment on it. They became aware of it only in March 2000, when officers of the Survey Department entered some of the authors' properties.

2.5 The "Final Trace", as an alternative roadway, was not examined in any EIA report. Any amendment of this nature would have required new approval under the NEA, and under the terms of the CEA's letter of approval. Neither the "Final Trace" nor the altered sections of the expressway route were approved afresh, as required by law. Therefore, the authors are being deprived of their property without a hearing and without the benefit of the legal provisions for assessment, comment and hearing contained in the NEA and its regulations. On or about 15 August 2002, several surveyors together with RDA officials and armed police officers, invaded the authors' land and properties and proceeded, despite protests, illegally and forcibly to survey their lands. They threatened, intimidated and harassed the authors and caused damage to some of their property.

2.6 The authors claim to have exhausted domestic remedies. On 29 July and 19 August 2002, the authors filed two writ applications in the Court of Appeal seeking a writ of certiorari to quash the RDAs decision to alter the route of the proposed expressway over the authors' lands. On 8 October 2002, the Court of Appeal appointed a committee composed of three retired Justices of the Supreme Court to look into several issues of the case. The report of the committee concluded that the revisions complained of could only be considered feasible and desirable if the procedure set out in the NEA, and Regulation 17 relating to revisions, were complied with. It also considered that the authors should be afforded an opportunity to comment on the "Final Trace".

2.7 On 30 May 2003, the Court of Appeal dismissed the authors' applications, on the ground that the obligation to society as a whole prevailed over the obligation to a group of individuals who were adversely affected by the construction of the expressway.

2.8 On 20 January 2004, the Supreme Court recognized that the authors' fundamental rights guaranteed under Article 12 (1) of the Constitution and the principles of natural justice had been infringed. However, it only granted compensation and costs instead of ordering to stop the implementation of the illegal revisions.[5] The authors have not collected the compensation deposited by the State authorities, as they do not consider compensation an appropriate relief for the loss of their human rights. They submit that the only appropriate remedy for an imminent violation of guaranteed fundamental rights is an order restraining such conduct.

2.9 On 15 January 2005, the Project Director of the Southern Transport Development Project announced in a newspaper that from 17 January onward, the remaining homes on the route of the expressway (including the authors') would be taken over, and that a Court order would be issued for eviction in the event of resistance. On 18 and 25 January 2005, some of the authors' properties were surveyed, despite inexistent or late notice, under an alleged court order, which was not shown to them. Officials illegally entered the homes of some of the authors.

The complaint

3.1 The authors, who are all affected by the final route of the expressway, claim a violation of article 26 as they were not afforded an opportunity to participate in the decision-making, the "scoping" or EIA process, and they were not given notice and a hearing, while those affected by the Combined Trace and Original Trace were. All those living along the "Combined Trace" were part of a Social Impact Assessment. No such opportunity was given to those living along the "Final Trace" and more specifically to the authors. In addition, as the Supreme Court found a violation of Article 12 (1) of the Constitution which is the equivalent of the right guaranteed by article 26, but only granted compensation, it violated their right to equality by failing to stop the violation of the authors' rights.

3.2 The authors claim that the right to life guaranteed by Article 6 of the Covenant has been interpreted by other treaty bodies, and also by the Human Rights Committee, in a broad manner, and consequently claim a violation of their right to life, which includes a right to a healthy environment. To ascertain what would be the environmental effects of this project would require studies in regard to which the affected parties have a legal right to be heard before their homes and livelihood are radically affected. In the present case, no such studies, EIAs and hearings required by law were conducted.

3.3 The authors claim to be the victims of a violation of article 19, paragraph 2, as they were not informed that they might be displaced. The RDA's decision to deviate the Final Trace over the authors' lands has placed them in a situation where they would lose their properties without the benefit of an EIA or a hearing. Since no EIA was done for the Final Trace, the authors have been denied their statutory right to information concerning environmental impacts.

3.4 The authors claim that the same matter has not been submitted for examination to another procedure of international investigation or settlement. They indicate that the deviations of the "Final Trace" were referred, by other affected victims, to the Asian Development Bank's inspection procedures, as the Bank was a co-financer of the project, with a view to examining whether this deviation involved possible violations of its own policies on resettlement and environment. The goal of these procedures was not to ensure that human rights guaranteed by the Covenant are protected. The authors point out that they are not parties to these proceedings.

State party's submissions on the admissibility and merits

4.1 On 8 April 2005, the State party challenged the admissibility of the communication. As a general comment, it states that the Southern Expressway project is a major development project undertaken by the State party for the benefit of the country and the people as a whole, in which considerable time and resources have already been invested. It challenges the admissibility because the authors have not exhausted domestic remedies, and notes that they did not avail themselves of the jurisdiction of the Supreme Court, under article 126 of the Constitution, to seek relief for alleged violations of their fundamental rights. The Constitution gives exclusive jurisdiction to the Supreme Court to hear and determine any allegation of a violation of fundamental rights. Although the Supreme Court found a violation of fundamental rights in the authors' case, the State party did not get an opportunity to defend its actions on this ground, because the authors did not invoke a violation of their fundamental rights before that Court. The authors have sought relief from the National Human Rights Commission, and no decision has been made on their case yet. It therefore considers that the only remedy the authors have sought in relation to their claims of a violation of their fundamental rights is before the National Human Rights Commission, where their case is still pending.

4.2 In addition, the State party claims that other affected parties have referred the matter to the Asian Development Bank's inspection procedures, with a view to seeking relief on the basis of the Bank's policies on resettlement and environment, which constitutes another procedure of international investigation or settlement, within the meaning of article 5, paragraph 2 (a), of the Optional Protocol.

4.3 On 7 September 2005, the State party commented on the merits of the communication. It reiterates that the Southern Development Project is vital for the development of Sri Lanka. According to established procedures, funding for projects of this nature is released only after the donors are satisfied that the implementation of the project does not result in violations of human and environmental rights.

4.4 The State party refers to the domestic proceedings before the Court of Appeal and Supreme Court, and to the written submissions which were filed on behalf of the RDA and the CEA, and which clearly define the position of the State party. In these submissions, it was argued that the RDA had not "altered" the project as approved by the CEA, in the sense of the relevant regulations. In the absence of such "alterations", there was no requirement for a supplementary EIA. In addition, it was argued that even if there had been an alteration, a supplementary EIA would not have been necessary in this case, because the altered project was situated within the same "corridor" (project area) as the one that had been studied in the EIA report. The State party argues that both the Court of Appeal and Supreme Court recognized that this development project is of immense value to the people of Sri Lanka, and decided on the continuance of the project under the final tracing. In arriving at this conclusion, the Courts duly considered the interests and claims of all stakeholders, especially of those who claimed that they would be affected.

4.5 The State party claims that although a few petitioners objected to the proposed project, the majority of the people in the area was in favour of it, and even insisted that it be expedited. The expressway would provide the much needed road infrastructure to the southern parts of the country, which have remained under-developed. It would connect them to Colombo, the capital, and thereby be a catalyst for an accelerated socio-economic development of the area. In the aftermath of the Tsunami disaster, which primarily affected the Southern coastal belt, catalysts of this nature are urgently needed in the reconstruction effort.

4.6 On the authors' claims under articles 26, 6 and 19, paragraph 2, of the Covenant, that the RDA decided on the final routing without affording an opportunity for the persons concerned to be heard under an inquiry procedure of the CEA, the State party argues that the reason why the RDA revised the route were concerns expressed by the CEA. The revisions were made to incorporate the concerns of the CEA, and with the understanding that this was the condition of the approval of the CEA. The "Final Trace" was formulated within the parameters established by the CEA. Since the revisions were made to address and minimise environmental concerns, no fresh approval was sought from the CEA.

4.7 By the time the authors filed court applications, it was far too late to consider new route alternatives, as this would have seriously impeded progress of the project. The Government had already taken steps to acquire land and paid compensation for the land acquired. It was not its intention to treat the authors in an unequal manner, to deprive them of their freedom of expression, or to interfere with their right to live in a healthy environment. The project was intended to bring development to the area and to improve the quality of life of the inhabitants of the area, including the authors.

4.8 On the authors' claim that the Supreme Court should, instead of awarding compensation, have directed the RDA to seek a fresh approval from the CEA and to grant the authors an opportunity to be heard, the State party contends that the Supreme Court did not stop the continuation of the project, since it was considered that irreparable damage would be caused if it did so. The Court, after considering all circumstances, deemed it just and equitable to award compensation to the authors, but allow the project to proceed. The Government has no power to direct the judiciary, which forms an independent pillar in the governance structure. It is bound to respects the judgements given by all competent courts in the State party.

4.9 The State party concludes that it is imperative that the project continue, in the larger interest of the country and its people. The communication involves issues on which the courts have, after careful considerations, come to definitive conclusions. They were of the view that a supplementary EIA was unnecessary, but that appropriate compensation should be given to the authors. Special steps have been taken according to law, to hold compensation inquiries, including to the benefit of the authors.

Author's comments on the admissibility and merits

5.1 On 17 November and 21 December 2005, the authors commented on the State party's submissions and reiterated their earlier claims. They indicate that the conditions formulated by the CEA, in its approval of 23 July 1999, included the following:

- Move the route from the "Combined Trace" to the "Original Trace" near Weras Ganga/Bolgoda lake wetlands (condition IX)
- Route the proposed expressway to avoid running through the Koggala and Madu Ganga Wetlands (condition X)
- Route the final trajectory to minimise relocation of individuals (condition F1)
- Obtain fresh approval in terms of Regulation 17(1)(a) in respect of any alterations that are intended to be made on the project (condition III)

The authors recall that their lands were not within the corridor which was studied in the EIA report. According to the authors, the costs of the three alternatives of the expressway in terms of housing are the following:

"Combined Trace": 622 houses "Original Trace": 938 houses
"Final Trace": 1,315 houses

The fact that the "Final Trace" has a higher housing displacement is a violation of condition F1 of the CEA's approval. Information on other costs and impacts of the three alternatives is not available.

5.2 On the State party's claim that the same matter has been submitted to another procedure of international investigation or settlement, the authors concede that they raised the matter with the Asian Development Bank, as it was one of the lending institutions for the project, which therefore had to comply with the guidelines and lending covenants of the Bank. The authors made a request to the Inspection Panel of the Bank to examine possible violations of the Bank's policies, provoked by the revision of the route. The Inspection Panel rejected the request. The authors continued to complain to the Bank, and the Safe Guard Panel of the Bank visited the area. Its report has not been transmitted to the authors. The matter was then referred to the Banks' Office of the Special Project Facilitator, where the possibility of alternative solutions was explored. However, the process was concluded without the parties reaching an agreement to solve the problem. The authors then referred the issue to the Bank's Compliance Review Panel, which observed that for the areas where the two main revisions were made, an EIA should be made, as there were substantial grounds for arguing that the project became non-compliant when the "Final Trace" was chosen, as new areas not included in the 1999 EIA report were included in the project, and as it failed to reach the broader goals of an EIA process such as public consultation. This is the current view of the Asian Development Bank, which, in early 2005, sent a new request to the University of Moratuwa to prepare rapidly a supplementary EIA report for the "Final Trace". The authors claim that the inquiry conducted by the Bank's Panel does not constitute proceedings before another international instance within the meaning of article 5, paragraph 2 (a). It is not a judicial or quasi-judicial forum and is merely an advisory mechanism for the Bank to ensure compliance with its own policies. Neither does it apply international law nor does it grant relief to applicants.

5.3 On the issue of non-exhaustion of domestic remedies, the authors maintain that they exhausted all domestic remedies, as their case was considered by the Supreme Court, which is the highest court in the State party. The Supreme Court dealt with the violation of the authors' fundamental rights guaranteed under article 12 (1) of the Constitution. Some authors also applied to the National Human Rights Commission, but no decision was made on the matter, and the authors subsequently filed applications in the Court of Appeal. On the argument that the authors did not invoke a violation of their fundamental rights in the domestic proceedings, they note that a petitioner cannot request the Court of Appeal to refer this matter to the Supreme Court. The Court of Appeal can do so if it believes that there is *prima facie* evidence of an infringement of fundamental rights by a party to the proceedings.

5.4 The authors indicate that the subject of this communication is the Supreme Court's failure to stop an imminent violation of equality before the law, although it had recognized an infringement of the authors' fundamental rights under article 12 (1) of the Constitution.

5.5 The authors reject the State party's contention that the project enjoyed wide public support. They claim that the methods used by the RDA included threats and harassment, and provide accounts from some of the authors on the conduct of RDA officers. Some of them have been forced to hand over their property before payment of compensation, or are not satisfied with the assessed compensation. Others have been promised a 25 per cent extra compensation if they vacated their properties before the given date, but have still not received the compensation. The authors add that the State party is manipulating their rights under the Resettlement Implementation Plan (RIP) of the RDA and the Asian Development Bank. The complete plan is not available to the authors although some extracts in English are available.[6] As a result, they remain unaware of their rights and entitlements under the RIP.

5.6 The authors indicate that the deadline for the completion of the land acquisition procedure was extended and finally set at 28 February 2005. They were forced to hand over their properties before receiving any compensation. Some of the authors' houses were taken without them being given alternative housing or land, and the compensation paid is insufficient to acquire a suitable property or build a house. Most of the authors earned an income from cultivating their properties and have lost their income as a result of the resettlement.

5.7 As to the State party's contention that the authors filed their applications out of time, the authors indicate that the construction contract was signed only in January 2003, nearly two years after they applied to the National Human Rights Commission. At that time, the authors had already introduced court proceedings, and the report of the Committee of retired Supreme Court judges of October 2002 clearly indicated the need for a supplementary EIA report. In addition, very little land had been acquired at that time, and this was only in relation to the original routing. The loan of the Asian Development Bank did not become effective until October 2002.

Issues and proceedings before the Committee

Consideration of admissibility

6.1 Before considering any claim contained in a communication, the Human Rights Committee must, in accordance with rule 93 of its rules of procedure, decide whether or not it is admissible under the Optional Protocol to the Covenant.

6.2 The State party has challenged the admissibility of the communication for non-exhaustion of domestic remedies, because the authors have failed to invoke a violation of their fundamental rights before domestic courts, and because their application before the Human Rights Commission is still pending. The Committee notes that the authors brought their case to the State party's highest court, and that it addressed their claim from a fundamental rights violations perspective, and indeed found a violation of their right to equality. It concludes that the authors have exhausted domestic remedies and it is therefore not precluded from considering the communication on this ground.

6.3 As to the State party's contention that the authors filed a complaint under another procedure of international investigation or settlement, the Committee notes that the authors' complaints to the Asian Development Bank were not based on allegations of a violation of Covenant rights. The Committee thus considers that the procedure before the Asian Development Bank does not amount to another procedure of investigation or settlement within the meaning of article 5, paragraph 2 (a), of the Optional Protocol.

6.4 On the authors' claim that they were victims of a violation of their right to life under article 6 because they were being deprived of a healthy environment, the Committee considers that the authors have not sufficiently substantiated this claim, for purposes of admissibility, under article 2 of the Optional Protocol.

6.5 On the authors' claim under article 26 of the Covenant, the Committee notes that the treatment they received, which was incompatible with the treatment they should have received under article 26, was found to be incompatible with article 12 (1) of the Constitution of Sri Lanka, which is the equivalent of article 26 of the Covenant. Moreover, they were afforded a remedy for that specific violation, in addition to the regular compensation they would receive for the loss of their property, and which the Committee is not in a position to consider inadequate. Accordingly, the authors can no longer be considered victims within the meaning of article 1 of the Optional Protocol. Accordingly, the Committee finds this part of the communication inadmissible under article 1 of the Optional Protocol.

6.6 The Committee observes that no separate issue arises under article 19, paragraph 2, which is not already covered by the claim under article 26. It concludes that this claim is inadmissible for the same reasons.

7. The Human Rights Committee therefore decides:

(a) That the communication is inadmissible under articles 1 and 2 of the Optional Protocol;

(b) That this decision shall be communicated to the State party and to the authors.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the Committee's annual report to the General Assembly.]

Notes

[1] The International Covenant on Civil and Political Rights and the Optional Protocol entered in force for the State party respectively on 11 September 1980 and 3 January 1998.

[2] The RDA was established under section 2 of the Road Development Authority Act No. 73 of 1981 as amended by Act No. 5 of 1988, and is empowered under the said Act inter alia to undertake the execution of road development projects and schemes as may be approved by the Government.

[3] The "scoping" involves discussions with all those affected by the project.

[4] The CEA was established under the National Environmental Act (NEA) No. 47 of 1980 as amended by Acts No. 56 of 1988 and 53 of 2000. Its primary function is to help establish environmental standards and to enforce the provisions of the NEA including the provisions pertaining to Environmental Impact Assessments (EIA) described in more detail below.

[5] The Supreme Court held that "the deviations proposed by the RDA were alterations requiring CEA approval after compliance with the prescribed procedures and the principles of natural justice, that despite the lack of such approval, the refusal of relief by way of writ, in the exercise of the Court's discretion was justified; but that the Appellants ought to have been compensated for the infringement of their rights under Article 12 (1) and the principles of natural justice. To that extent, the appeals are allowed and the order of the Court of Appeal is varied." It therefore granted and issued "an order in the nature of a writ of *Mandamus* directing the CEA to require the RDA to pay, and directing the RDA to pay, each of the Appellants compensation in a sum of Rs. 75,000. That will be in addition to the compensation payable by the State under the Land Acquisition Act, and in terms of the CEA approval and the compensation package referred to by the Respondents in their written submissions. To preclude further delays, misunderstandings and allegations of victimization, [it] further directed that the Appellants shall have the right to accept such compensation and to hand over possession of their lands without such prejudice to their rights of appeal in respect of the quantum of compensation".

[6] The vast majority of the authors do not understand English.

APPENDIX

Individual opinion by Committee members Mr. Walter Kälin and Mr. Hipólito Solari-Yrigoyen

We agree with the Committee that the violation of the prohibition of discrimination has been redressed by the Supreme Court to the effect that the authors are no longer victims of said violation, but regret that other relevant aspects of the case were not examined. While it is true that the authors have not explicitly claimed to be victims of their rights to choose their own residence and to be protected against being subjected to arbitrary or unlawful interference with their privacy and home, the facts before us (paras. 2.3-2.5 and 2.9) as well as their claim that their homes and livelihoods were radically affected (para. 3.2) clearly raise issues under Articles 12, paragraph 1 and 17 of the Covenant. To be forced to leave one's own home to make place for the realization of a development project such as the expressway at issue in the present case certainly constitutes a restriction of these rights which is consistent with the Covenant only if it is provided by the law and necessary to achieve one of the legitimate aims listed in Article 12, paragraph 3 and is neither unlawful nor arbitrary in accordance with Article 17. While building an expressway may certainly be important for the development of a country and thus serve a legitimate aim, these provisions require that forced displacements or relocations must be lawful, i.e. ordered in accordance with domestic law, and necessary to achieve this aim.

We note that the REA started the construction of the expressway along the "Final Trace", without having obtained a new EIA, as required by law. The Supreme Court found a violation of the authors' right to equality on this ground. In addition, it appears that surveys were conducted in some of the authors' homes, without them having received any notice. Finally, it seems that the "Final Trace" affected more than double the number of houses that would have been affected by the "Combined Trace" in violation of the CEA's requirement that the final trajectory should minimise the relocation of individuals. All of this indicates that the ordered displacement of the authors may neither have been lawful nor necessary to the extent that a less intrusive trajectory might have been possible.

For these reasons, the Committee should have declared the communication admissible and examined these questions on the merits. The Committee could have invited the State party to submit further comments, should it have felt that the State did not have a sufficient opportunity to comment on the issues related to Articles 12 and 17 of the Covenant.

(*Signed*): Mr. Walter Kälin

(*Signed*): Mr. Hipólito Solari-Yrigoyen

[Done in English, French and Spanish, the English text being the original version. Subsequently to be issued in Arabic, Chinese and Russian as part of the Committee's annual report to the General Assembly.]

BB. Communication No. 1374/2005, *Kurbogaj v. Spain* (Decision adopted on 14 July 2006, eighty-seventh session)*

Submitted by:	Azem Kurbogaj and Ghevdet Kurbogaj (represented by counsel, Mr. Sadije Mjekiqi)
Alleged victims:	The authors
State party:	Spain
Date of communication:	23 November 2004 (initial submission)
Subject matter:	Jurisdiction of State party over acts committed by the Spanish Police Unit of UNMIK
Procedural issues:	Non-exhaustion of domestic remedies
Substantive issues:	Ill-treatment of authors and members of their family
Articles of the Covenant:	2, paragraph 3 (a); 7; 17
Articles of the Optional Protocol:	5 (2) (b)

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 14 July 2006

Adopts the following:

Decision on admissibility

1. The authors of the communication are Azem (first author) and Ghevdet (second author) Kurbogaj, both of Kosovar Albanian origin, born on 22 April 1949 and on 4 May 1975, respectively. They claim to be victims of violations by Spain of articles 2, paragraph 3 (a); 7 and 17 of the Covenant. They are represented by counsel, Mr. Sadije Mjekiqi. The Covenant and the Optional Protocol entered into force for Spain on 27 July 1977 and on 25 January 1985, respectively.

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* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Nisuke Ando, Mr. Prafullachandra Natwarlal Bhagwati, Ms. Christine Chanet, Mr. Maurice Glèlè Ahanhanzo, Mr. Edwin Johnson, Mr. Walter Kälin, Mr. Ahmed Tawfik Khalil, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Ivan Shearer, Mr. Hipólito Solari-Yrigoyen and Mr. Roman Wieruszewski.

Factual background

2.1 On 1 February 2003, at approximately 4.00 a.m., officers belonging to a special Spanish Police Unit of the United Nations Interim Administration Mission in Kosovo (UNMIK) forced their way into the authors' two adjacent houses located at Peja/Pec (Kosovo), breaking the doors and searching the premises without giving any reason. During the four-hour search, members of both families were forced to lie on the ground face down, with their hands tied behind their backs.

2.2 The first author was kicked and beaten on his shoulder. Despite the low temperature and the fact that several windows of his house had been broken by the police, he was forced to lie down on the cold floor, dressed only in shorts and a tee shirt. As a result, he caught bronchitis and developed asthma for the first time in his life, for which he was subsequently hospitalized for 10 days.

2.3 Similarly, during the search of the second author's house, his pregnant wife, V.K., was forced to lie face down on the ground, with her hands tied behind her back, for three hours, one week prior to childbirth. A 1-year-old child also caught bronchitis because of the manner and duration of the searches. Another family member, N.K., was pushed by the police while chopping firewood with an axe, causing cuts on her hand that required stitches.

2.4 The police confiscated savings of the families totalling €187,000 from the second author's home, a pistol type TT-1, two hunting rifles, three cellular phones and €40 belonging to the first author's wife, A.K. One rifle and two cellular phones were later returned to the authors. The damage caused to the furniture, doors and windows of the properties was in the order of €4,700. While the first author signed a record of the search of his house, no such record was established in the second house, from where the said monies were confiscated.

2.5 Following the searches four members of the family, including the second author, were arrested and taken to the regional police headquarters in Pec. The second author was informed that he was a suspected terrorist. In particular, he was suspected of having attacked the UNMIK police station in Pec with a grenade in January 2003. He was released after approximately 36 hours in police custody. The other three individuals remained in detention for about four hours.

2.6 The authors' lawyer reported the matter to the UNMIK Police Commissioner, who replied that he could not accept the complaints. No reply was received from the Public Prosecutor in Pec District Court, to whom an application for the return of the seized items and compensation was addressed. The Ombudsperson in Kosovo wrote to the UNMIK Police Commissioner and, subsequently, to the Special Representative of the Secretary General, requesting access to the relevant file and documents, in accordance with the obligation to provide these under section 4.7 of Regulation 2000/38 on the Establishment of the Ombudsperson Institution in Kosovo. However, the Ombudsperson received no reply from them.

2.7 The authors provided to the Committee copy of a letter from the District Public Prosecutor to the Head of the Criminal Division at the Department of Justice informing him about the damage caused during the search. The letter indicates that the first author was claiming compensation.

The complaint

3.1 The authors claim violations of their rights under article 2, paragraph 3 (a), of the Covenant, as no effective remedy was available to them in Kosovo. The opening of an investigation by the prosecutor would have no reasonable prospects of success, in light of the immunity afforded to UNMIK under paragraph 3.3 of UNMIK Regulation No. 2000/47 on the Status, Privileges and Immunities of KFOR and UNMIK and their personnel. Such paragraph provides that "UNMIK personnel, including locally recruited personnel, shall be immune from legal process in respect of words spoken and all acts performed by them in their official capacity".

3.2 The authors submit that their case falls within the jurisdiction of Spain by virtue of the control exercised over them by members of the Spanish Police Unit of UNMIK. In this respect, they invoke the Committee's Views in *Saldías de López v. Uruguay*, according to which States parties are responsible for the violations of the Covenant committed by their agents on foreign territory.[1] The authors also invoke the Committee's general comment No. 31 (2004), and state that Spain must respect and ensure the rights laid down in the Covenant to anyone within its power or effective control, even if not situated within its territory, regardless of the circumstances in which such power or effective control was obtained, such as forces constituting a national contingent assigned to an international peacekeeping or peace-enforcement operation.

3.3 The authors claim that, even though remedies might be available to them in Spain, these remedies are theoretical and illusory, but not available and effective, as required by the Covenant. It would be impractical for logistical reasons to require counsel to leave Kosovo and to pursue a remedy before the courts of Spain. He would be required to apply for a Spanish visa, but no Spanish Liaison Office exists in Kosovo which he could approach, neither does one exist in Skopje, the nearest foreign capital city. In Sarajevo, there is a Spanish liaison office where a visa could be sought, but in order to enter Bosnia with a UNMIK passport a Bosnian visa must be held, which can only be applied for in Skopje.

3.4 The authors recall that the European Court of Human Rights has held in numerous cases that the applicant must be able to initiate proceedings directly, without reliance on public officials, in order for the remedies to be adequate and effective. Obtaining the necessary visas and other travel documents would require discretionary action on the part of the respondent State. Therefore, the remedies which the State party might claim to be available to the authors in theory are rendered ineffective and inadequate in practice due to the dependency on such discretionary powers of the State party.

3.5 The authors claim that they were not provided with any information whatsoever either by the Spanish Police Unit, the UNMIK Police Commissioner or the Kosovo Ombudsperson, about potential remedies in Spain, and detailed information about such remedies was difficult to obtain. Article 23 of the Organic Law of Judicial Power (*Ley Orgánica del Poder Judicial*) provides that the Central Criminal Court (*Audiencia Nacional*) in Madrid has jurisdiction, at least in theory, over acts perpetrated by Spanish civil servants in the exercise of their functions abroad. Furthermore, the cost of taking proceedings in Spain is likely to be high, due to the need for the presence of both an attorney and a barrister before the Court and also, in the case of the authors, a translator/interpreter, as well as the travel costs.

3.6 The authors indicate that the weak situation of human rights protection in Kosovo and the absence of review mechanisms were the subject of a report by the Council of Europe Parliamentary Assembly entitled "*Protection of human rights in Kosovo*", dated 6 January 2005. According to this report, UNMIK is not subject to the jurisdiction of any court, but only to the non-binding jurisdiction of the Kosovo Ombudsperson; this constitutes a serious lacuna in the human rights protection system in Kosovo. The report recommends the establishment of a Human Rights Court for Kosovo.

3.7 The authors claim to be victims of a violation of article 7 of the Covenant, as their and their families' treatment by the police during the unlawful searches was inhuman. In particular, the fact that the first author was assaulted and that all members of the families were forced to lie on the floor for hours in freezing temperatures, including the second author's pregnant wife, amounts to a violation of article 7. The searches were conducted in an inhuman manner, several persons were assaulted, the health of others harmed and substantial damage to property was caused.

3.8 The authors allege a violation of their right, under article 17, not to be subjected to arbitrary or unlawful interference with their privacy, family and home. They refer, in this respect, to Section 3.5 of UNMIK Regulation 2000/47, which provides that: "UNMIK personnel shall respect the laws applicable in the territory of Kosovo and regulations issued by the Special Representative of the Secretary-General, in the fulfillment of the mandate given to UNMIK by Security Council resolution 1244 (1999). They shall refrain from any action or activity incompatible therewith." Furthermore, the searches were not conducted in accordance with the then applicable "Yugoslav. Law on Criminal Procedure",[2] according to which a search warrant must be presented before the beginning of the search, and a receipt for confiscated property must be issued. The search and seizure were conducted without any, or any proper, authorization or safeguards.

State party's observations on admissibility

4.1 By submission of 30 September 2005, the State party challenges the admissibility of the communication, alleging that the authors were neither within its territory nor subject to its jurisdiction. The facts are alleged to have occurred as part of UNMIK activities. Accordingly, the entity ultimately responsible is UNMIK, which is not a party to the Covenant. A State party to the Covenant cannot be held responsible by resorting to the argument that UNMIK regulations are ineffective, especially when no domestic remedy of such State was sought.

4.2 There are no similarities between the present case and the *Saldia de Lopez v. Uruguay* case invoked by the authors. In the latter, the State agents responsible were not part of a United Nations Mission, but simply carrying out illegal activities outside the territory of the State's jurisdiction. In the present case, Spain cannot be held responsible for violations of articles 7 and 17 of the Covenant, in view of the location where the alleged acts took place, the nature of the police force alleged to have carried them out and the applicable law, i.e. UNMIK regulations or Yugoslav laws.

4.3 The State party rejects the authors' claim regarding a violation of article 2, paragraph 3 (a), by Spain. It is paradoxical to state, on one hand, that Spain has not provided an effective remedy and, on the other, that domestic remedies in Kosovo are ineffective. Given the nature of remedies in Kosovo which the authors considered it appropriate to exhaust (i.e. complaint before the UNMIK Police Commissioner and the local Prosecutor), it is clear that Spain cannot be expected to establish "effective remedies" in Kosovo. Furthermore, there is no evidence whatsoever of the alleged facts before the Spanish authorities, since they were never even brought to their attention.

4.4 The State party adds that free legal assistance benefits exist in Spain and that persons without resources can be assisted by a lawyer provided by the State. However, the authors did not even try to avail themselves of this possibility. Furthermore, an administrative claim regarding State liability can be formulated in writing and sent by mail, but not even this avenue was attempted by the authors.

4.5 Criminal proceedings are conducted ex-officio in Spain. If Spanish courts were competent to deal with the case, a simple complaint containing the basic facts would have been sufficient to initiate an investigation. However, this possibility was not explored either. The State party concludes, accordingly, that no domestic remedies have been exhausted.

4.6 The authors should have availed themselves of the possibilities provided for in paragraph 6.1 of UNMIK Regulations 2000/47, which define the right and duty of the Secretary General to waive the immunity of its personnel "in any case where, in his opinion, the immunity would impede the course of justice and can be waived without prejudice to the interest of UNMIK". This remedy is an effective one and has been resorted to on several occasions. Furthermore, Section 7 of the same Regulations stipulates that "Third party claims for property loss or damage and for personal injury, illness or death arising from or directly attributed to KFOR, UNMIK or their respective personnel and which do not arise from "operational necessity" of either international presence, shall be settled by Claims Commissions established by KFOR and UNMIK, in the manner to be provided for". There is no indication in the authors' submission that they ever filed a claim with this commission. Nor is any information about the result of the complaint allegedly filed with the Ombudsperson. In this respect, the State party recalls paragraph 3.1 of Regulation No. 2000/38 on the Establishment of the Ombudsperson Institution in Kosovo, according to which "the Ombudsperson shall have jurisdiction to receive and investigate complaints from any person or entity in Kosovo concerning human rights violations and actions constituting an abuse of authority by the interim civil administration or any emerging central or local institution. The Ombudsperson shall give particular priority to allegations of especially severe or systematic violations and those founded on discrimination." The State party concludes that effective avenues of redress existed in Kosovo, none of which appear to have been pursued or completed.

4.7 The State party points out inconsistencies which raise doubts about the veracity of the author's allegations. For instance, it seemed odd that the members of the families were forced to lie down while at the same time one of them was allowed to use an axe. The police implication in the acts causing the injury with the axe remains unclear. Finally, a link between the police activity and the delivery of the pregnant woman a few days later seems to be suggested, but it remains speculative. There are also some mistakes in the authors' submission. For instance, it ignores the fact that a new Code of Criminal Procedure was adopted in Kosovo in July 2003, as result of which the rules regarding police searches referred to by the authors are no longer in force.

4.8 The State party concludes that the Committee has no competence in respect of activities of UNMIK and its personnel under the Optional Protocol, and that the authors have not exhausted domestic remedies available in the State party and in Kosovo.

Author's comments

5. By letter dated 14 January 2006 the authors insist on the veracity of the facts alleged. They say that the case was reported to the UNMIK Police Commissioner and a number of authorities in Pec, including the International Public Prosecutor, the District Public Prosecutor, the District Court, the Mayor and the International Administrator, as well as the Kosovo Government and the Ombudsperson in Prishtina. The authors requested all of them to take action, including by prosecuting those responsible and have the money and other stolen belongings returned. However, nothing has been done and there is no other remedy they can resort to in Kosovo. They reject the State party's argument about its lack of responsibility and reaffirm that Spain is responsible for the actions of its Police.

Issues and proceedings before the Committee

6.1 Before considering any claim contained in a communication, the Human Rights Committee must, in accordance with rule 93 of its rules of procedure, decide whether or not the communication is admissible under the Optional Protocol to the Covenant.

6.2 The Committee has ascertained, in accordance with article 5, paragraph (a), of the Optional Protocol, that the same matter is not being examined under another international procedure of international investigation or settlement.

6.3 The authors claim that the State party is responsible for the violation of their rights as a result of illegal acts committed by the Spanish Police Unit present in Kosovo. They invoke, in this respect, the Committee's general comment No. 31, pursuant to which a State party must respect and ensure the rights laid down in the Covenant also to anyone within the power or effective control of the forces of a State party acting outside its territory, regardless of the circumstances in which such power or effective control was obtained, such as forces constituting a national contingent of a State party assigned to an international peacekeeping or peace-enforcement operation. Without pronouncing itself on the question of jurisdiction in the particular circumstances of the case, the Committee notes that the authors did not address themselves at any point to any penal or administrative authorities in Spain. The Committee does not ignore the authors' arguments regarding the practical difficulties they could encounter in initiating proceedings in Spain, but notes the State party's observation that a written complaint would have been enough to, at least, initiate an investigation. The Committee recalls that mere doubts about the effectiveness of judicial remedies or the prospect of substantial costs of pursuing such remedies do not absolve a complainant from his/her obligation to attempt to exhaust them.[3] In the light of the foregoing, the Committee concludes that the authors failed to exhaust domestic remedies.

7. The Committee, therefore, decides:

(a) That the communication is inadmissible under article 5, paragraph 2 (b) of the Optional Protocol;

(b) That this decision shall be communicated to the authors and the State party.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the Committee's annual report to the General Assembly.]

Notes

[1] Communication No. 52/1979, *Saldias de López v. Uruguay*, Views adopted on 29 July 1981.

[2] The authors quote in this respect article 207 of the Law, which reads: "(1) A search shall be ordered by court in a written and substantiated warrant. (2) The search warrant shall be presented before commencement of the search to the person whose place [...] is to be searched. (3) A search may also be conducted without prior presentation of a warrant [...], if armed resistance is assumed or if it is necessary to perform the search immediately and by surprise, or if the search is to be conducted in a public place." They also quote art. 208 of the same Law, according to which: "(3) Two adult citizens shall be present as witnesses when a dwelling or person is searched. Before commencement of the search, the witnesses shall be cautioned to note how the search is conducted and instructed that they have a right to make their objections before signing the record of the search, if they feel that the content of the record is not accurate. [...] (7) A record shall be drawn up concerning each search of a dwelling or person, and it shall be signed by the person whose premises or person have been searched and by the persons whose presence is required. During a search, only those items and papers related to the purpose of the search in the particular case shall be temporarily confiscated. The things and papers confiscated shall be entered and precisely indicated in the record, and the same information shall also be entered on the receipt which shall immediately be given to the person whose things or papers have been confiscated."

[3] See, for instance, communication No. 397/1990, *P.S. v. Denmark*, Decision of 22 July 1992, para. 5.4.

CC. Communication No. 1387/2005, *Oubiña v. Spain*
(Decision adopted on 25 July 2006, eighty-seventh session)*

Submitted by:	Laureano Oubiña Piñeiro (represented by counsel, Mr. Jose Luis Mazón Costa)
Alleged victim:	The author
State party:	Spain
Date of communication:	7 April 2004 (initial submission)
Subject matter:	Extent of review of criminal case on appeal (*cassation*) by Spanish courts
Procedural issue:	Failure to substantiate claim
Substantive issue:	Right to have sentence and conviction reviewed by a higher tribunal according to law
Article of the Covenant:	14, paragraph 5
Article of the Optional Protocol:	2

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 25 July 2006,

Adopts the following:

Decision on admissibility

1. The author of the communication, dated 7 April 2004, is Laureano Oubiña Piñeiro, a Spanish national born in 1946. He claims to be a victim of a violation of article 14, paragraph 5, of the Covenant by Spain. The Optional Protocol came into force for the State party on 25 April 1985. The author is represented by counsel Jose Luis Mazón Costa.

Factual background

2.1 On 19 June 2002, the Criminal Chamber of the National Court (*Audiencia Nacional)* sentenced the author to six years and nine months' imprisonment and payment of a fine for trafficking in hashish. According to the judgement, in July 1997, the police had found some packages with hashish in Pontevedra, Spain. The following day, agents of the Service of Customs Surveillance (*Servicio de Vigilancia Aduanera*), under the Ministry of Internal Affairs, arrested the author near a football ground in Vigo. The author insists that he was convicted on the basis of purely circumstantial evidence.

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* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Nisuke Ando, Mr. Prafullachandra Natwarlal Bhagwati, Mr. Maurice Glèlè Ahanhanzo, Mr. Edwin Johnson, Mr. Walter Kälin, Mr. Ahmed Tawfik Khalil, Mr. Rajsoomer Lallah, Ms. Elisabeth Palm, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Ivan Shearer and Mr. Hipólito Solari-Yrigoyen.

2.2 The author appealed (*casación*) to the Second Chamber of the Supreme Court, alleging a violation of the principle of presumption of innocence, because he was convicted notwithstanding insufficient evidence against him. He alleged that the court of first instance mistakenly assessed the facts of his case. On 25 September 2003, the Supreme Court rejected the appeal. The author contends that the Supreme Court expressly stated that the appeal (*casación*) "was not a second instance".

2.3 The author appealed (*amparo*) to the Constitutional Court, alleging several violations of his constitutional rights, including the right to a second instance. The author contends that, as to the right to a second instance, the appeal (*amparo*) has no prospect of success, because the Constitutional Court's jurisprudence is contrary to the Committee's Views. He invokes a judgement of the Constitutional Court of November 2002, in which it reiterates that the appeal (*casación*), although limited in its scope, complies with the requirements of article 14, paragraph 5, of the Covenant. The same judgement allegedly rejects the possibility that the Committee's Views could be an authentic interpretation of the Covenant.

The complaint

3. The author alleges a violation of his right to have his sentence and conviction reviewed by a higher court (art. 14, para. 5). He invokes the wording used by the Court while rejecting one of the grounds of appeal, that the appeal (*casación*) was not a second instance. He contends that the Supreme Court did not review the evidence of the trial, and invokes the Committee's Views in three cases against Spain.[1]

State party's submissions on admissibility and author's comments

4.1 On 30 June 2005, the State party contests the admissibility of the communication on the basis of non-exhaustion of domestic remedies and lack of substantiation. With regard to the first requirement, the State party argues that the author failed to demonstrate that he exhausted domestic remedies, because he did not provide copies of the judgement of the Constitutional Court in his *amparo* appeal. According to the State party, the author's omission deprives the Committee of the opportunity to assess whether or not the Constitutional Court pronounced itself on the extent of the review carried out by the Supreme Court, especially taking into account that the Constitutional Court's jurisprudence establishes the threshold that any court review should meet to comply with the requirements of article 14, paragraph 5, of the Covenant.

4.2 The State party alleges that the communication is manifestly ill-founded because:

(a) The author did not provide a copy of the appeal (*cassation*) which makes it impossible to know which matters he submitted for review to the Supreme Court;

(b) The Supreme Court stated that the author limited himself to reproducing the arguments he advanced in the court of first instance, without substantiating his allegations;

(c) The mere reading of the judgement of the Supreme Court demonstrates the broad extent of the review carried out by that court, both on issues of fact and law. The court extensively analysed 21 grounds of appeal invoked by the author, including allegations related to: the right to an impartial tribunal; the handing down of the judgement beyond the time limit stipulated in the Spanish Criminal Procedure Code; the conduct of the preliminary investigation in two separate settings; the exclusion as evidence of expert reports on issues of law; that the Customs Surveillance Agency has no competence to carry out arrests; the secrecy of private correspondence; the acceptance of telephonic wire-tapping and the transcripts of such tapping as evidence; the alleged absence of the telephones and the cassettes used in the tapping at the beginning of the oral hearing; the right to defence; the appropriateness of the evidence proposed by the author; the alleged erroneous weighing of the evidence and the violation of the presumption of innocence;

(d) In several passages of the judgement, the Court referred to the facts of the case and the evidence. The State party invokes and transcribes that part of the judgement in which the Court addresses the allegation of a violation of the principle of the presumption of innocence.

5.1 By submission of 20 September 2005, the author notes that, on 14 March 2005, the Constitutional Court dismissed his appeal (*amparo*). He adds that the Constitutional Court erred in concluding that the Spanish cassation system complies with the requirements of article 14, paragraph 5, of the Covenant. He insists that the judgement of the National Court (*Audiencia Provincial*) acknowledges that the appeal (*cassation*) is not a second instance.

5.2 The author insists that his conviction was based on purely circumstantial evidence and that he always denied involvement in the crime. He adds that defendants cannot freely raise allegations on appeal (cassation), but just those limited grounds allowed by the law. The appeal (cassation) does not allow for the review of facts, as the remedy of appeal does. He insists that he could not obtain a full review of his conviction because he could not raise any allegations on review of facts or mistakes in the weighing of evidence.

Issues and proceedings before the Committee

Consideration of admissibility

6.1 Before considering any claims contained in a communication, the Human Rights Committee must, in accordance with rule 93 of its rules of procedure, decide whether or not it is admissible under the Optional Protocol to the Covenant.

6.2 With regard to the alleged violation of Article 14, paragraph 5, the Committee notes that, contrary to the author's allegations, the Supreme Court did not state that it was not a higher tribunal in the sense of article 14, paragraph 5 of the Covenant when deciding about an appeal. Rather, it used the phrase "forgetting that cassation is not a second instance", which the author relies on, in order to explain why the author could not, as he did, limit himself to reproduce, on appeal, claims he had submitted to the lower court (i.e. that the court of first instance was incompetent to try him), instead of substantiating them by reference to the judgement of the lower court. In reality, the Supreme Court did, as transpires from the text of the judgement, deal extensively with issues of facts, examined closely the National Court's assessment of the evidence, and explained in considerable detail why it considered that the evidence against the author was sufficient to outweigh the presumption of innocence. In the light of these considerations, the Committee concludes that the claim under article 14, paragraph 5, is insufficiently substantiated, for purposes of admissibility. It, therefore, concludes that the communication is inadmissible under article 2 of the Optional Protocol.[2]

6.3 Having reached such a conclusion, the Committee considers that it does not need to examine the other grounds of inadmissibility invoked by the State party.

7. The Human Rights Committee therefore decides that:

(a) That the communication is inadmissible under article 2 of the Optional Protocol;

(b) That this decision shall be transmitted to the State party and to the author.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the Committee's annual report to the General Assembly.]

Notes

[1] Communication No. 701/1996, *Gómez Vázquez v. Spain*, Views of 20 July 2000; communication No. 986/2001, *Semey v. Spain*, Views of 30 July 2003; and communication No. 1007/2001, *Sineiro Fernández v. Spain*, Views of 7 August 2003.

[2] I.e., communication No. 1059/2002, *Carvallo v. Spain*, Decision of 28 October 2005, para. 9.5; No. 1356/2005, *Parra Corral v. Spain*, Decision of 29 March 2005, para. 4.3; No. 1389/2005, *Bertelli v. Spain*, Decision of 25 July 2005, para. 4.5; and No. 1399/2005, *Cuartero Casado v. Spain*, Decision of 25 July 2005, para. 4.4.

DD. Communication No. 1396/2005, *Rivera Fernández v. Spain* (Decision adopted on 28 October 2005, eighty-fifth session)*

Submitted by:	Jesús Rivera Fernández (not represented by counsel)
Alleged victim:	The author
State party:	Spain
Date of communication:	29 July 2004 (initial submission)
Subject matter:	Dismissal of application for membership in the High Council of the Judiciary
Procedural issues:	Same matter examined under another proceeding of international investigation or settlement; inadmissibility *ratione materiae*
Substantive issues:	Freedom of association, fair trial, non-discrimination
Articles of the Covenant:	14 (1), 22 and 26
Articles of the Optional Protocol:	3 and 5 (2) (a)

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 28 October 2005,

Adopts the following:

Decision on admissibility

1.1 The author of the communication, dated 29 July 2004, is Jesús Rivera Fernández, a Spanish judge born in 1957. He claims to be a victim by Spain of violations of article 14, paragraph 1, and article 22, paragraph 1, read in conjunction with article 26 of the Covenant. The Optional Protocol entered into force for Spain on 25 April 1985. The author is not represented by counsel.

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* The following members of the Committee participated in the examination of the present communication: Mr. Nisuke Ando, Mr. Prafullachandra Natwarlal Bhagwati, Mr. Alfredo Castillero Hoyos, Ms. Christine Chanet, Mr. Maurice Glèlè Ahanhanzo, Mr. Edwin Johnson, Mr. Walter Kälin, Mr. Ahmed Tawfik Khalil, Mr. Rajsoomer Lallah, Mr. Michael O'Flaherty, Ms. Elisabeth Palm, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Ivan Shearer, Mr. Hipólito Solari-Yrigoyen, Ms. Ruth Wedgwood and Mr. Roman Wieruszewski.

1.2 On 19 August 2005, the Special Rapporteur on new communications and interim measures granted the State party's request that the admissibility of the communication be dealt with separately from the merits.

Factual background

2.1 On 13 June 2001, the author applied for membership in the General Council of the Judiciary (*Consejo General del Poder Judicial*, hereinafter referred to as the Council). The Council is the managing body of the Spanish judiciary. It is composed of 21 members, 12 of whom come from the Bench. These 12 members are designated by the Congress. On 28 June 2001, an amendment to the Law on the Judiciary modified the system for the appointment of the 12 members of the Council from the Bench. Before the entry into force of the amendment, judges could freely elect their candidates to be proposed to Congress as representatives of the Bench in the Council. After the amendment, up to 36 candidates have to be proposed by either an existing judges association, or by non-associated judges supported at least by 2 per cent of all the judges in active service. Associated judges can only vote for candidates who belong to their respective association. Non-associated judges running for membership in the General Council, although obliged to be supported at least by 2 per cent of all judges in service, can only seek such endorsement among non-associated judges. The law also set out that the total membership of any association of judges should remain unchanged as of 1 June 2001.

2.2 Until 12 June 2001, the author was a member of the Professional Association of Magistrates of Murcia, to which he resigned in order to present an independent candidacy, which was supported by 40 judges, none of whom belonged at that time to any of the existing judges' associations. On 18 July 2001, the President of the General Council dismissed the author's application, because it was not supported by the minimum number of endorsements required by the Law on the Judiciary (*Ley Orgánica del Poder Judicial*).

2.3 On 31 July 2001, the author appealed (*recurso contencioso-administrativo*) to the Seventh Section of the Third Chamber of the Supreme Court. On 27 September 2001, the Third Chamber dismissed the author's appeal. It considered that the General Council's prerogative to communicate to Congress a list with the names of 36 candidates for membership in the Council was preparatory in nature, and that the final decision nominating the 12 candidates to the King belonged to Congress. This prerogative of the Congress, not being a definite administrative act, could not be challenged through an appeal (*recurso contencioso-administrativo*). On 9 October 2001, the author asked the Court to reconsider its decision. He alleged violations of fair trial guarantees and that he had been discriminated. On 15 November 2001, the Chamber dismissed the appeal for reconsideration. On 27 November 2001, the author appealed (*amparo*) to the Constitutional Court. While this appeal was pending, the author withdrew the allegations related to fair trial guarantees and discrimination. On 14 November 2002, the Court dismissed the appeal.

2.4 On 19 March 2003, the author applied to the European Court of Human Rights, alleging violations of article 11 (1) (freedom of association), in conjunction with article 14 (prohibition of discrimination), article 6 (1) (right to fair trial), and article 13 (right to an effective remedy), of the European Convention on Human Rights. On 11 May 2004, the Court declared the application inadmissible, since it did not reveal the appearance of any violation of any of the rights enshrined in the Convention.

The complaint

3.1 The author alleges a violation to his right to freedom association and his right to equality before the law (article 22, paragraph 1, read in conjunction with article 26 of the Covenant). He alleges that the voluntary character of the right to freedom of association was violated by the legislative amendment to the Law on the Judiciary. Although he had withdrawn his membership in the professional association of judges of Murcia as of 12 June 2001, the law continued to consider him as an associated judge, thereby denying him the opportunity to endorse candidates who were not associated, as was his intention, because the law only authorizes non-associated candidates to seek endorsement from non-associated judges. Furthermore, he contends that non-associated candidates are at a disadvantage if compared to associated judges: (i) they must seek the endorsement of non-associated judges, requirement that is not applicable to associated judges; (ii) the law obliges non-associated candidates to seek the endorsement by at least 2 per cent of all active judges instead of allowing them to seek such endorsement only among non-associated judges, thereby raising the eligibility threshold to become eligible for appointment; (iii) the President of the General Council had denied advance access to the list of non-associated judges, so candidates did not have prompt access to potential electors and had to investigate who they were.

3.2 The author also alleges the violation of his right to equality before the courts (article 14, paragraph 1, of the Covenant): he was not informed in advance of the composition of the Seventh Section of the Third Chamber, so he could exercise his right to recuse the judges; the number of judges was arbitrarily modified from 5 to 7 in his case; the President of the Third Chamber arbitrarily decided to chair the Seventh Section; and three judges should have recused themselves because they were members of an association of judges which took part in the proceedings. Furthermore, the author alleges that his right to have equal access to court was violated, because the Seventh Section of the Third Chamber refused to consider the merits of his appeal, as it did in another, very similar, case.

3.3 The author finally alleges a violation of article 14, paragraph 1; since the courts considered that the decision of the President of the Council was not final in nature and, therefore, not subject to judicial review. The author contends that this characterization of the decision of the President of the Council is arbitrary and unreasonable.

3.4 The author acknowledges that his communication to the Committee is identical to his application to the European Court of Human Rights but considers that the European Court did not deal with the merits of his application, so that it cannot be deemed to have "considered" the "same matter" which he is raising before the Committee.[1]

State party's submission on the admissibility of the complaint and author's comments

4.1 On 11 August 2005, the State party challenges the admissibility of the communication. It alleges that the author's allegations had already been examined by the European Court of Human Rights, which concluded that his application "did not reveal the appearance of any violation of any of the rights enshrined in the Convention". The State party considers that the ruling of the European Court amounts to an "examination" of the case, for purposes of article 5, paragraph 2 (a), of the Optional Protocol, and concludes that the communication is inadmissible under that provision and in the light of the State party's reservation to that provision. It recalls Committee's decision of 30 March 2004 on communication No. 1074/2002 (*Navarra Ferragut v. Spain*, at para. 6.2).

4.2 The State party argues that the author's claims relate to an alleged right - the right to be proposed as a candidate to membership in the General Council of Justice - which is not protected by the Covenant and does not constitute "the determination of rights and obligations in a suit of law", within the meaning of article 14, paragraph 1. The State party concludes that the communication is incompatible *ratione materiae* with the Covenant, and, therefore, inadmissible.

4.3 The State party adds that the proceedings for the selection of the members of the Council do not impose on candidates any duty to associate. It recalls that issues of evaluation of facts and interpretation of domestic law pertains to national tribunals, and that the regulations concerning the appointment of candidates to membership in a national institution is a matter that falls outside of the Covenant provisions. It concludes that the communication is manifestly ill-founded, and therefore, inadmissible.

5. By submission of 6 September 2005, the author insists that the European Court of Human Rights did not examine the merits of his application because it adopted its decision on the admissibility of his application without having heard him and without providing any reasoning.

Issues and proceedings before the Committee

Considerations on the admissibility of the communication

6.1 Before considering any claims contained in a communication, the Human Rights Committee must, in accordance with rule 93 of its rules of procedure, decide whether or not it is admissible under the Optional Protocol to the Covenant.

6.2 With regard to the alleged violation of article 22 (freedom of association), the Committee recalls its jurisprudence[2] that article 11, paragraph 1, of the European Convention as interpreted by the European Court of Human Rights, is sufficiently proximate to article 22, paragraph 1, of the Covenant; that when the European Court based a declaration of inadmissibility not solely on procedural grounds but on reasons that include a certain consideration of the merits of the case, then the same matter should be deemed to have been "examined" within the meaning of the respective reservations to article 5, paragraph 2 (a), of the Optional Protocol; and that the European Court should be considered to have gone beyond the examination of purely procedural admissibility criteria when declaring the application inadmissible, because it does "not disclose any appearance of a violation of the rights and freedoms set out in the Convention or its Protocols". The same criteria apply to the present case. The fact that article 26 of the Covenant differs from article 14 of the European Convention appears to be of no relevance in this case, because the author invoked these provisions before the respective competent bodies in relation to the right to freedom of association, which is regulated similarly under both treaties.

Consequently, the Committee concludes that this part of the communication is inadmissible under article 5, paragraph 2 (a), of the Optional Protocol and the reservation of Spain to the said provision.

6.3 With regard to the alleged violations of article 14, paragraph 1, the Committee recalls it jurisprudence that a claim related to the election of members of the High Council of Justice is not related to the determination of rights and obligations in a suit at law, within the meaning of article 14, paragraph 1, and concludes that author's allegations concerning article 14 are incompatible *ratione materiae* with that provision and thus inadmissible under article 3 of the Optional Protocol.[3]

6.4 The Human Rights Committee therefore decides:

(a) That the communication is inadmissible under articles 3 and 5, paragraph 2 (a), of the Optional Protocol;

(b) That this decision shall be transmitted to the State party and to the authors.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the Committee's annual report.]

Notes

[1] European Court of Human Rights, Fourth Section, application No. 9527/03, *Rivera Fernández v. Spain*, judgement of 11 May 2004.

[2] See communication No. 1002/2001, *Franz Wallmann, Rusella Wallmann and Hotel zum Hirschen Josef Wallmann v. Austria*, Views of 1 April 2004, at paras. 8.4 and 8.5.

[3] See communication No. 943/2000, *Guido Jacobs v. Belgium*, Views of 7 July 2004, at para. 8.7.

EE. Communication No. 1400/2005, *Beydon v. France* (Decision adopted on 31 October 2005, eighty-fifth session)*

Submitted by:	Ms. Nicole Beydon and 19 other members of the association "*DIH Mouvement de protestation civique*"
Alleged victims:	The authors
State party:	France
Date of communication:	16 July 2004 (initial submission)
Subject matter:	Alleged damages to members of a non-governmental organization by virtue of State party attitude vis-à-vis the International Criminal Court
Procedural issues:	Exhaustion of domestic remedies; subsidiary character of article 2 of the Covenant; incompatibility *ratione materiae* with the provisions of the Covenant
Substantive issues:	Right to access to courts; Right to take part in the conduct of public affairs
Articles of the Covenant:	2, paragraph 3 (b) and (c), 14, paragraph 1, and 25 (a)
Articles of the Optional Protocol:	1 and 2

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 31 October 2005,

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* The following members of the Committee participated in the examination of the present communication: Mr. Nisuke Ando, Mr. Prafullachandra Natwarlal Bhagwati, Mr. Alfredo Castillero Hoyos, Mr. Maurice Glèlè Ahanhanzo, Mr. Edwin Johnson, Mr. Walter Kälin, Mr. Ahmed Tawfik Khalil, Mr. Rajsoomer Lallah, Mr. Michael O'Flaherty, Ms. Elisabeth Palm, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Ivan Shearer, Mr. Hipólito Solari-Yrigoyen, Ms. Ruth Wedgwood and Mr. Roman Wieruszewski.

Pursuant to rule 90 of the Committee's rules of procedure, Committee member Ms. Christine Chanet did not participate in the adoption of the present decision.

Adopts the following:

Decision on admissibility

1. The authors of the communication are Ms. Nicole Beydon and nineteen other persons, all French citizens. They claim to be victims of violations by France of article 2, paragraph 3 (b) and (c); article 14, paragraph 1; and article 25 (a), of the International Covenant on Civil and Political Rights.[1] They are represented by counsel, Mr. Francois Roux.

Factual background

2.1 The authors are members of "*DIH Mouvement de protestation civique*" ("*DIH*"), a human rights non-governmental organization (NGO) established in 1991 in Chambon-sur-Lignon, France. One of the association's objectives is to campaign for the creation of a permanent, independent, and effective international criminal court.

2.2 The authors mounted a legal challenge against the allegedly intransigent position of the Government of France regarding article 124 of the Rome Statute of the International Criminal Court (ICC) which entitles a State party to the Statute to declare that is does not accept the jurisdiction of the Court over war crimes, alleged to have been committed by its nationals or on its territory, for a period of seven years, with the declaration being renewable indefinitely. They specifically challenged the Government's insistence on inclusion of article 124 being one of the most restrictive and controversial provisions governing the Court's jurisdiction over war crimes which created a legal void and institutionalized impunity. The authors also criticized that France, when depositing the instrument of ratification on 9 June 2000, made a declaration under article 124[2] and alleged that this declaration not only restricted the Court's competence vis-à-vis France but also directly affected themselves, and French citizens at large, by depriving them of a remedy to prosecute and punish human rights transgressors. They also alleged that the French position was motivated exclusively by internal political and strategic considerations, namely the pressure from the Ministry of Defence to protect its armed forces from testifying before the ICC.

2.3 On 14 January 1997, the *DIH* submitted a "pretrial brief" (*mémoire préalable*) to the French Ministry of Foreign Affairs, alleging violations of article 2, paragraph 3 (b) and (c), and article 25 (a) of the Covenant, article 2, paragraph 2, of the Human Rights Charter, as well as article 28 of the Universal Declaration of Human Rights. In the absence of a reply, *DIH* filed a suit against the government before the Administrative Tribunal in Paris (*Tribunal administratif de Paris*) on 11 July 1997, requesting 60,000,000 French Francs (FF) in compensation. By judgement of 24 June 1999, the Tribunal dismissed the claim on the grounds that it lacked jurisdiction to entertain a complaint relating directly to the State's exercise of its diplomatic prerogatives. The Tribunal also deemed *DIH's* request for compensation to be an abuse of the submission procedure and fined the association 10,000 FF.

2.4 On 18 August 1999, *DIH* filed an appeal before the Administrative Court of Appeal in Paris (*Cour administrative d'appel de Paris*) on the grounds that the Tribunal had failed to provide a rationale for its verdict; that it had failed to consider the complainants' arguments invoking the principles of unkept promises and reasonable expectations; and that it had mistaken its symbolic request for 60,000,000 FF (1 Franc per French citizen) for an abuse of the system. In later submissions, the *DIH* added that the French position in the negotiations not only engaged the state's liability ("*responsabilité sans faute de l'Etat*") but that it was also "separable" from an act of government which administrative courts were not competent to examine; it also reduced its demand for compensation to a symbolic sum of 1 FF. By judgement of 29 October 2002, the Court of Appeal upheld the Tribunal's decision, finding that the Government's position in the ICC negotiations, not being detachable from the conduct of French international relations, fell outside the purview of domestic courts. However, it annulled as unjustified the Tribunal's decision to fine the complainants for abuse of the system.

2.5 In order to appeal (*pourvoi en cassation*) this verdict before the State Council (*Conseil d'Etat*), *DIH* applied for legal aid at the State Council's Legal Aid Office on 26 December 2002. Its request was rejected on 3 March 2003, on the grounds that the appeal was "manifestly inadmissible". The authors argue that this decision deprived them of all effective internal remedies and that the rationale for the rejection further shows that their appeal would have no prospect of succeeding in cassation.

The complaint

3.1 The authors allege that the French Government violated article 25 (a) of the Covenant by depriving them of the right and the opportunity to take part in the conduct of public affairs relating to the ICC. They claim that despite numerous calls by parliamentary groups, individual senators, and non-governmental organizations at the time of the National Assembly debates on the ratification of the Rome Statute in February 2000 not to invoke this clause, France did not take into account either the authors' objections or the widespread public opposition expressed both directly and through their elected representatives to the French declaration under article 124.

3.2 The authors also allege that they are victims of a violation by France of their rights under article 2, paragraph 3 (b), which obliges the State-party to ensure recourse to judicial remedies and to develop the possibilities of judicial remedy. The authors argue that the creation of an international criminal court had the very aim of developing judicial remedies to prosecute the perpetrators of war-crimes in States signatories to the Rome Statute and that by invoking article 124, France deprived its citizens of an "effective international judicial remedy".

3.3 The authors also claim a violation of article 2, paragraph 3 (c), read in conjunction with article 14, paragraph 1 (access to court) because the domestic courts had erroneously relied on the notion of "act of government" in international relations, invoked by the Ministry of Foreign Affairs, to declare their incompetence, for lack of jurisdiction, to decide the case brought to them by *DIH* because, according to the relevant domestic jurisprudence the French declaration under article 124 should have been considered an "*acte détachable*"- i.e. an act which could be separated from the broader conduct of foreign relations. The authors argue that the State Party cannot invoke the theory of *acte de gouvernement* since it was internal rather than external considerations that determined the French position in the negotiations on article 124. The authors further claim that article 2, paragraph 3 (c), along with article 14, paragraph 1 of the Covenant was violated because the State Council's Legal Aid Office denied their request for legal aid although the State representative (*Commissaire du Gouvernement*) before the Court of Appeal had suggested that it was "not without hesitation" that he found the administrative courts incompetent to review the matter.

3.4 The authors further invoke the principle of protection of legitimate expectation (*confiance légitime*) articulated by the Court of Justice of the European Communities, which extends to all individuals in situations where the administration's conduct may have led them to entertain reasonable expectations and which obliges the administration to honour its promises. The authors note that French domestic law similarly recognizes the notion of unkept promises (*promesses non tenues*) and that the State Council has applied in the past the concept of "*responsabilité sans faute de l'Etat*" to cases in which the government repudiated a process it had already started or announced. Because France was one of the original supporters of the early proposals to create an international criminal court, by "radically" reversing its position in August 1996, the French government allegedly broke its earlier promise and acted in bad faith by invoking the provisions of article 124, which is said to amount to violations of article 2, paragraph 3 (b) and (c), read with article 25 (a) of the Covenant.

Issues and proceedings before the Committee

4.1 Before considering any claims contained in a communication, the Human Rights Committee must, in accordance with rule 93 of its rules of procedure, decide whether or not it is admissible under the Optional Protocol to the Covenant.

4.2 The Committee has ascertained that the same matter is not being examined under another procedure of international investigation or settlement for the purposes of article 5, paragraph 2 (a), of the Optional Protocol.

4.3 The Committee notes that the authors of the communication claim that in the context of domestic proceedings, they have become victims of violation by the State party of their rights under article 2, paragraph 3 (c), in conjunction with article 14, paragraph 1, of the Covenant. The Committee recalls[3] that for a person to claim to be a victim of a violation of a right protected by the Covenant, he or she must show either that an act or an omission of a State party has already adversely affected his or her enjoyment of such right, or that such an effect is imminent, for example on the basis of existing law and/or judicial or administrative decision or practice. It notes that it was not the authors, but DIH, an association with legal personality under French law, that was party to the domestic proceedings. Thus, the Committee finds that that the authors were not victims, within the meaning of article 1 of the Optional Protocol, of the alleged violation of article 2, paragraph 3 (c), in conjunction with article 14, paragraph 1, of the Covenant.

4.4 As regards the authors' claim that their right under article 2, paragraph 3 (b) was violated because they are deprived of an effective judicial remedy in the case of war crimes, the Committee notes that the authors have not shown that the French position regarding article 124 of the ICC Statute has already adversely affected them, or that such an effect is imminent. Consequently, the authors are not victims under the meaning of article 1, of the Optional Protocol.

4.5 The Committee has further noted the authors' claim under article 25 (a), that they were deprived, by the State party, of their right and opportunity to take part in the conduct of public affairs relating to the negotiations, and subsequent adhesion of France to the ICC Statute with a declaration under article 124 limiting the State party's responsibility, the Committee recalls[4] that citizens also take part in the conduct of public affairs by exerting influence through public debate and dialogue with their representatives or through their capacity to organize themselves. In the present case, the authors have participated in the public debate in France on the issue of its adhesion to the ICC and on the issue of article 124 declaration; they acted through elected representatives and through their association's actions. In the circumstances, the Committee considers that the authors have failed to substantiate, for purposes of admissibility, that their right to take part in the conduct of public affairs has been violated. Accordingly, this part of the communication is inadmissible under article 2 of the Optional Protocol.

5. The Human Rights Committee therefore decides:

(a) That the communication is inadmissible under articles 1 and 2, of the Optional Protocol;

(b) That this decision shall be transmitted to the State party and to the authors, for information.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the Committee's annual report.]

Notes

[1] The Optional Protocol entered into force for the State party on 17 May 1984.

[2] French Declaration under article 124: "Pursuant to article 124 of the Statute of the International Criminal Court, the French Republic declares that it does not accept the jurisdiction of the Court with respect to the category of crimes referred to in article 8 when a crime is alleged to have been committed by its nationals or on its territory."

[3] See *E.W. et al. v. The Netherlands*, communication No. 429/1990, Inadmissibility decision of 8 April 1993.

[4] See general comment No. 25 (1996).

FF. Communication No. 1403/2005, *Gilberg v. Germany* (Decision adopted on 25 July 2006, eighty-seventh session)[*]

Submitted by:	Erich Gilberg (not represented by counsel)
Alleged victim:	The author
State party:	Germany
Date of communication:	11 February 2005 (initial submission)
Subject matter:	Denial of appointment as civil servant on grounds of age
Substantive issues:	Equality before the law and equal protection of the law - length of court proceedings - equal access to public service
Procedural issues:	State party's *ratione temporis* reservation - level of substantiation of claim - exhaustion of domestic remedies
Articles of the Covenant:	2 (1); 14; 25 (c); and 26
Articles of the Optional Protocol:	2 and 5 (2) (b)

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 25 July 2006,

Adopts the following:

Decision on admissibility

1. The author of the communication is Mr. Erich Gilberg, a German national, born on 28 June 1937. He claims to be a victim of violations by Germany[1] of articles 2, 14, 25 (c) and 26 of the Covenant. He is not represented by counsel. The Covenant and the Optional Protocol to the Covenant entered into force for Germany on 23 March 1976 and 25 November 1993 respectively.

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[*] The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Nisuke Ando, Mr. Prafullachandra Natwarlal Bhagwati, Mr. Maurice Glèlè Ahanhanzo, Mr. Edwin Johnson, Mr. Walter Kälin, Mr. Ahmed Tawfik Khalil, Mr. Rajsoomer Lallah, Ms. Elisabeth Palm, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Ivan Shearer and Mr. Hipólito Solari-Yrigoyen.

Factual background

2.1 On 25 July 1963, the author obtained a university degree in physics. From 1 October 1963 to 30 June 1969, he was employed as research assistant at Munich University with the status of public employee. On 23 April 1969, he received a Ph.D. in natural sciences. From 1 July 1969 to 31 August 1981, he was employed as research assistant with the temporary status of civil servant (*Beamter auf Zeit*).

2.2 During these periods, the author was only insured under the obligatory pension scheme. Because of the temporary nature of his employment in each case, he was neither insured under the supplementary occupational pension scheme for public employees, nor under the pension scheme for civil servants.

2.3 From 1 April 1982 to 31 October 1985, the author worked at the European Molecular Biology Laboratory in Heidelberg. Between 1 November 1985 and 30 September 1990, he worked with a private company manufacturing optical devices. On 8 June 1988, he received the degree of *doctor habilitatus* at Munich University. Between 1 November 1990 and 28 February 1991, he worked in an optical company in Cervino (Italy).

2.4 On 2 May 1990, the author applied for a professorship for technical optics at the University of Applied Sciences (*Fachhochschule*) in Frankfurt am Main. On 7 September 1990, the Hessian Ministry of Science and Arts (hereafter "the Ministry") offered to appoint him as public employee, stating that no appointment as civil servant was possible after his fiftieth birthday. The author accepted the offer on 13 September 1990, and on 1 March 1991, he took up his teaching functions. His employment contract provided that he would be covered by the occupational pension scheme, although public employees working as professors are normally excluded from that scheme. On 27 November 1991, he applied for appointment to the status of civil servant, arguing that his net salary was considerably lower than that of a civil servant and that the age limit of 50 years referred to by the Ministry was not established by law. He subsequently repeated his request and invoked a comparable case, in which one Mr. L., who belonged to the same age group as the author and, unlike him, only held a university degree, was appointed to the status of civil servant as professor at the Frankfurt University of Applied Sciences. The Ministry rejected his applications by administrative act on 11 May 1993 and upon review on 6 September 1993.

2.5 On 11 October 1993, the author appealed to the Administrative Court in Frankfurt am Main, which transferred his complaint to the Administrative Court of Wiesbaden. He argued that the impugned decisions had no statutory basis and did not indicate whether the Ministry had duly considered his eligibility for a civil servant post. In its job offer dated 7 September 1990, the Ministry had misinformed him that no appointment to a civil servant post was possible beyond the age of 50, thereby depriving him of an opportunity to make his acceptance dependent on such appointment.

2.6 On 11 April 1994, as part of the written court proceedings, the Ministry submitted that section 48 of the Budget Regulations of the State of Hessen authorizes the Hessian Ministry of Finance to establish age limits for the appointment to civil servant posts. On the basis of section 48, the conditions of access of different age groups to such posts had been defined in an administrative circular: The appointment of applicants aged 50 to 54 required a special public service need, whereas the appointment of applicants aged 55 to 59 and, in exceptional cases, of university professors aged 60 and older required an urgent public service need. Applicants aged 60 and older other than university professors were not eligible for civil servant posts. A special public service need exists if the appointment to a civil servant post is "urgently indicated"; an urgent public service need exists if no equally qualified candidates are available and if the recruitment or continued employment of the applicant can only be ensured by appointment to a civil servant post. In the case of applicants who are already employed as public employees in the State of Hessen it must be established that they would otherwise quit the public service. The Ministry argued that, at the time of his appointment, the author had already passed the age limit of 50 years and that there was no special public service need for appointing him as a civil servant, let alone an urgent public service need following his 55th birthday on 28 June 1992. The author's case had to be distinguished from that of Mr. L., who, after generally having accepted a similar offer to be appointed as public employee, but well before the date of his actual appointment, had requested to be considered for appointment to the status of civil servant. The Ministry had granted the request because Mr. L. was the only candidate recommended by the Faculty Board and to ensure continuity of teaching during the winter term 1992/93.

2.7 On 20 March 1995, the Wiesbaden Administrative Court quashed the impugned decisions, considering that they were not sufficiently reasoned, and referred the matter back to the Hessian Ministry of Science and Arts, requiring it to make full use of its discretion in applying the criteria set out in the administrative circular concerning the appointment of applicants aged 50 to 54 to a civil servant post.

2.8 On 14 August 1995, the Ministry appealed the judgement to the Higher Administrative Court of Kassel, invoking the absence of a special public service need to appoint the author as a civil servant, as well as the need for a strict application of this requirement to attenuate the massive increase of pension expenditures in the State of Hessen.

2.9 On 13 July 1999, the Higher Administrative Court quashed the Administrative Court's judgement. By reference to the jurisprudence of the Federal Administrative Court, it held that even in the absence of a statutory law, the State had competence to set age limits for the appointment of civil servants to ensure an adequate balance between the number of years in service and the financial burden for the pension fund. The decision of 6 September 1993 of the Ministry of Science and Arts was sufficiently reasoned, as it stated that the Finance Ministry had refused to give its consent to the author's appointment as civil servant. The refusal itself was in conformity with the administrative guidelines, since the author had never declared his intention to leave public service in case of rejection of his request to be appointed as civil servant during the administrative or judicial proceedings. The fact that he had agreed to his employment as public employee distinguished him from other professors who had been appointed as civil servants despite having exceeded the age limit. The Court denied leave to appeal. The author did not file a constitutional complaint with the Federal Constitutional Court.

2.10 On 24 August 2001, the author again applied to the Ministry for an appointment as civil servant, as well as for his retroactive exemption from any obligatory insurance from which civil servants are exempted or, subsidiarily, for an adjustment of his employment contract with a view to granting him, throughout the time of his active teaching as well as his retirement, all privileges enjoyed by civil servants and for the reimbursement of any taxes and contributions paid to obligatory insurance schemes from which civil servants are exempted. He argued that his unfavourable treatment in comparison with other professors of his age group, who had been appointed as civil servants on the ground that it was uncertain whether they would have accepted an appointment as public employee, violated the constitutional non-discrimination clause (article 3 of the Basic Law) as well as the constitutional provision on equal access to public service (article 33, paragraph 2, of the Basic Law). While there was a presumption that applicants from outside the public service of the State of Hessen, such as his colleagues Mr. L. and Mr. F., would not accept any other status than that of a civil servant, applicants from within the Hessian public service, such as the author, had to prove that they would leave public service if their appointment to the status of civil servant were to be denied. Moreover, the Kassel Higher Administrative Court had ignored the fact that the Ministry had intentionally misinformed him that no appointment to a civil servant post was possible beyond the age of 50.

2.11 On 4 October 2001 and, on review, on 13 December 2001, the Hessian Ministry of Science and Arts dismissed the author's application to re-open the proceedings, as lodged out of time.

2.12 On 9 January 2002, the author appealed to the Frankfurt Administrative Court, reiterating that the dismissal of his application of 24 August 2004 violated German constitutional law, international treaties such as, inter alia, article 26 of the Covenant and articles 7 (a) (i) and 9, read in conjunction with article 2, paragraph 2, of the International Covenant on Economic, Social and Cultural Rights, as well as EU law. On 28 May 2002, the Frankfurt Administrative Court dismissed the appeal, in the absence of a subsequent change of the facts or the law which would have justified re-opening the author's case after it had been decided by a final court decision and after the end of the three-month deadline for applying for such re-opening. The author should have raised the alleged violations of international human rights law during the court proceedings between 1993 and 1999, since all treaties invoked by him had been in force for Germany at that time.

2.13 On 1 and 24 June 2002, the author "extended his claim", invoking article 1, paragraph 2, and article 12, paragraph 4, of the European Social Charter and emphasizing that it was for the courts, rather than for a claimant, to ensure the application of legislation implementing Germany's obligations under international human rights treaties. On 15 July 2002, the Frankfurt Administrative Court declared the author's application for an extension of his claim inadmissible, in the absence of pending court proceedings.

2.14 On 17 September 2002, the author applied for leave to appeal the judgement of the Administrative Court, which had ignored the incompatibility of his treatment with international human rights norms, in particular article 26 of the Covenant. This constituted sufficient grounds for revoking the, albeit final, decisions of the Hessian Ministry of Science and Arts or for re-opening his case. By decision of 24 September 2002, the Higher Administrative Court of Kassel denied leave to appeal, as the author's appointment to a civil servant post was no longer possible under the Hessian Civil Servants Act after he had reached the statutory age limit of 65 years. Revoking the impugned decisions of the Ministry or re-opening the author's case would therefore be a futile exercise.

2.15 On 28 October 2002, the author filed a constitutional complaint with the Federal Constitutional Court alleging violations of the equal treatment clause (article 3 of the Basic Law) and his rights to equal access to public service (article 33, paragraph 2) and to judicial review (article 101, paragraph 1). He invoked international human rights norms, including articles 25 (c) and 26 of the Covenant. By reference to the Committee's jurisprudence, he submitted that a distinction related to age which is not based on reasonable and objective criteria may amount to discrimination on the ground of "other status" or to a denial of equal protection of the law within the meaning of article 26, arguing that reducing State expenditure was not a legitimate aim in his case. On 2 August 2004, the Federal Constitutional Court rejected the author's complaint.

2.16 On 15 April 2002, the author filed a suit with the Labour Court of Frankfurt, claiming (1) €162,068.93 compensation for the difference between his salary and that of a professor with the status of civil servant for the time between 1 March 1991 and his retirement on 31 August 2002 plus €18,359.92 interest; (2) payment of a civil servant pension as of 1 September 2002 equal to the pension that he would have been entitled to had he been appointed as civil servant for lifetime on 1 March 1991; and (3) compensation (plus 4 per cent interest p.a.) for any contributions to the health and infirmity insurance schemes to be paid by him as of 1 September 2002, from which civil servants are exempted, until such time that his entitlement to civil servant allowances has been ascertained by final decision. On 19 February 2003, the Labour Court declared the author's second and third claims inadmissible for lack of specificity and rejected his first claim on the merits, since he had been remunerated on the basis of a valid employment contract and since there was no tort liability on the part of the State of Hessen, which had not violated any duty of care through its refusal to appoint the author to a civil servant post, as confirmed by final judgement dated 13 July 1999 of the Higher Administrative Court of Kassel. The author did not appeal that judgement.

The complaint

3.1 The author claims that the refusal to appoint him as civil servant and his less favourable treatment with regard to remuneration, contributions to the unemployment, health and old age insurance schemes, as well as pension entitlements, discriminated against him, in violation of articles 25 (c) and 26 of the Covenant, if compared to civil servants with identical tasks, such as Mr. E. and Mr. L. The length of the appeal proceedings before the Kassel Higher Administrative Court violated his right to a fair trial under article 14, paragraph 1, of the Covenant.

3.2 The author submits that he received the same gross salary and had identical tasks as colleagues with the status of civil servant. The latter was reflected by the fact that in many vacancy notes for public service positions the occupational status of the person to be appointed was left open. As a public employee, he had to pay contributions to the ordinary unemployment and pension schemes and to the occupational pension scheme, thereby reducing his net salary by significant amounts between 1991 and 2002, if compared to the net salary he would have received as a civil servant.

3.3 The author argues that, while he would have received €3,922.84 monthly pension (75 per cent of his last monthly salary in 2002 totaling €5,230.46) as a civil servant, from which only €103.09 would have been deduced as contributions to the health and infirmity insurances, his monthly pension in 2002 only amounted to €1,966.18 (€1,703.82 from the obligatory pension scheme and €262.36 from the occupational pension scheme), from which he had to pay monthly contributions of €305.61 to the health and infirmity insurances. This was due to the fact that, unlike civil servants who were entitled to health and infirmity allowances, he only benefited from a monthly subsidy of €133.75 from the obligatory pension scheme. As a retired civil servant he would have been entitled to a thirteenth salary in December each year.

3.4 The author submits that out of the 29 years and 5 months that he worked in public service, only six months have been counted as periods with positive contributions to the occupational pension scheme. Accordingly, his monthly pension of €262.36 from the occupational scheme resulted from the numbers of years of his school and university education rather than his work in public service. Had all periods during which he worked in public service been counted as periods with contributions to the occupational pension scheme, his monthly pension would have amounted to €3,066.75, which was still much less than the pension that he would have received as a civil servant. This discrepancy was to be explained by the fact that contributions to the health, unemployment and pension insurances had steadily increased since the 1950s, without that being compensated by a corresponding increase in the gross salaries of public employees, let alone professors with the status of public employee, who received exactly the same gross salaries as their civil servant colleagues without the additional seven per cent normally paid to "adjust" the net salary of public employees to that of civil servants.

3.5 For the author, his treatment as a "second class public servant" is not justified by any reasonable and objective criteria. He rejects as purely fictitious the differences routinely invoked by German courts to justify the less favourable treatment of public employees, i.e. the public law character of the appointment of civil servants as opposed to public employees whose appointment is governed by private law, the obligation of civil servants actively to defend the constitutional order as opposed to the passive duty of public employees not to violate the constitutional order, and the fact that civil servants, unlike public employees, have no right to strike. In particular, the absence of a right to strike for civil servants was irrelevant, since any increases in the gross salaries of public employees negotiated by their trade unions were equally applied to the gross salaries of civil servants.

3.6 Similarly, the author considers that the refusal to appoint him as professor with the status of civil servant was not based on reasonable and objective criteria, as required by articles 25 (c)[2] and 26 of the Covenant. He argues that failure by a State party to comply with its immediate obligation under article 2, paragraph 2, to take steps to give effect to the prohibition of discrimination cannot be justified by reference to economic considerations, such as reducing the expenditures of the pension fund. Nor could the refusal to appoint him as civil servant be justified by his age, given that his colleagues Mr. E. and Mr. L. had been appointed as civil servants, although they belonged to the same age group and despite their lower qualifications. While it was true that Mr. L. had been the only candidate recommended by the Faculty Board, Mr. E. had been recommended together with two other candidates.

3.7 The author claims that the length of the appeal proceedings before the Kassel Higher Administrative Court, which lasted from 14 August 1995 to 13 July 1999, violated his right to a fair trial (article 14, paragraph 1), given that there was no public hearing and that the same Court decided his appeal within one week in September 2002, on the basis that he had meanwhile reached retirement age.

3.8 The author submits that same matter is not being examined under another procedure of international investigation or settlement. He was not required to exhaust domestic remedies in the first set of proceedings, because challenging the Higher Administrative Court's decision not to grant leave to appeal its judgement of 13 July 1999 would have been futile in the light of the jurisprudence of the Federal Administrative Court which, in two comparable cases, had recognized the competence of the Executive to define age limits for the appointment to civil servant posts and to refuse such appointment on economic grounds. As for the possibility of lodging a constitutional complaint, his lawyer had advised him that such a complaint would be without reasonable prospect of success, since the Federal Constitutional Court traditionally granted the legislator a wide margin of discretion as regards distinctions based on age. The scope of articles 3, paragraph 1 (non-discrimination), and 33, paragraph 2 (equal access to public service) of the Basic Law was narrower than that of its counterparts in articles 26 and 25 (c) of the Covenant. The lack of prospect of success of this remedy was also demonstrated by the rejection of his constitutional complaint in the second set of proceedings. To appeal the judgement of the Frankfurt Labour Court would have been futile in the light of the jurisprudence of the Federal Labour Court that professors with the status of public employee had no entitlements beyond those contained in the author's contract and that their exclusion from the occupational pension scheme was lawful.

State party's observations on admissibility

4.1 On 1 August 2005, the State party challenged the admissibility of the communication, arguing that the alleged violations have their origin in events occurring prior to the entry into force of the Optional Protocol for Germany and that the author has failed to exhaust domestic remedies.

4.2 The State party invokes its reservation concerning the Committee's jurisdiction *ratione temporis* which, unlike similar reservations made by France, Malta and Slovenia, explicitly refers to the events at the origin of the alleged violation, rather than to the violation itself. It submits that the violations claimed by the author have their origin in the decision dated 11 May 1993 of the Hessian Ministry of Science and Arts rejecting his application for appointment to the status of civil servant, rather than in the decision of 13 July 1999 of the Kassel Higher Administrative Court. Given that the Ministry's decision of 11 May 1993 pre-dated the entry into force of the Optional Protocol for Germany on 25 November 1993, the State party concludes that the communication is inadmissible *ratione temporis* based on the German reservation.

4.3 For the State party, the author did not exhaust domestic remedies, as he failed to challenge the Kassel Higher Administrative Court's denial to grant him leave to appeal its decision dated 13 July 1999 to the Federal Administrative Court, or to lodge a constitutional complaint with the Federal Constitutional Court. Such complaints would not *ab initio* have been futile; the Federal Administrative Court's jurisprudence cited by the author related to different cases involving non-appointment to the status of civil servant of a larger group of employees and, in the second case, of a much younger person. Similarly, the Federal Constitutional Court's jurisprudence invoked by the author concerned an entirely different field of law, namely social law. The author's failure to avail himself of all available remedies in the first set of proceedings could not be healed by reopening *res judicata* proceedings.

Author's comments

5.1 On 30 October 2005, the author submitted his comments arguing that the State party's reservation *ratione temporis* was inapplicable and that he exhausted domestic remedies. He submits that the German reservation does not apply to his case, since it expressly concerns article 5, paragraph 2 (a), of the Optional Protocol. Given that his case has not been and is not being considered under another procedure of international investigation or settlement, it falls outside the scope of the reservation.

5.2 He further argues that the wording of subparagraph (b) of the reservation ("having its origin in events occurring prior to the entry into force") was not sufficiently "specific and transparent", as required by general comment No. 24.[3] The reservation failed to address the fact that human rights violations can have their origin in a series of events, including direct and indirect causes, some of which may have occurred prior and others subsequent to the entry into force of the Optional Protocol for a State party. In his case, the discrimination against him could be linked to events following the entry into force of the Optional Protocol for Germany on 25 November 1993, such as the decision of 13 July 1999 of the Higher Administrative Court of Kassel, as well as to events pre-dating the entry into force, such as the Budget Regulations or the administrative circular of the State of Hessen, or the administrative acts dated 11 May and 6 September 1993 of the Hessian Ministry of Science and Arts rejecting his application for appointment to a civil servant post.

5.3 For the author, the State party's interpretation of its reservation as precluding the Committee's competence to consider a communication in all cases where one of the events giving rise to a complaint occurred prior to the entry into force of the Optional Protocol, is incompatible with the object and purpose of the Optional Protocol. The German reservation was therefore inadmissible, as it effectively sought to preclude the rights obligatory for the State party under the Covenant from being tested before the Committee.

5.4 The author concludes that the Committee's competence *ratione temporis* to consider a communication should be ascertained on the basis of whether or not the alleged violation continued or continued to have effects after the entry into force of the Optional Protocol. This was the case with regard to his discriminatory salary between 1991 and 2002 and his disadvantageous pension benefits received thereafter.

5.5 As regards exhaustion of domestic remedies, the author argues that it would have been futile to appeal the decision of 13 July 1999 of the Higher Administrative Court of Kassel to the Federal Administrative Court, given that the decision was based on the very jurisprudence of the Federal Administrative Court in similar cases, confirming the refusal to appoint individual applicants to the status of civil servant. If the State party argued that one of these cases involved the non-appointment of a much younger applicant than the author, then this only underlined that the Federal Administrative Court would have rejected his appeal.

5.6 The author submits that the rejection on substantive grounds of his constitutional complaint in the second set of proceedings showed that it would have been equally futile for him to lodge a constitutional complaint with the Federal Constitutional Court in the first set of proceedings. Moreover, his unawareness of the possibility to submit a communication under the Optional Protocol following exhaustion of domestic remedies could not be attributed to him, since he was never advised of that possibility by any of the lawyers and judges involved in the first set of proceedings from 1993 to 1999.

5.7 The author contends that, rather than reopening *res judicata* proceedings, the purpose of the second set of proceedings initiated by him was to revoke what he considers an unlawful, albeit final, administrative act denying his appointment to a civil servant post.

5.8 On 27 January 2006, the author made additional comments, reiterating that the Hessian Ministry of Science and Arts had deliberately misinformed him, in violation of article 25 (c), read in conjunction with article 2, of the Covenant, that his appointment to the status of civil servant was no longer possible after the age of 50.

5.9 The author submits that the Ministry's refusal to appoint him as civil servant, as well as the court decisions confirming this refusal, amounted to a breach of the non-discrimination and equal treatment principles enshrined in international human rights and EU law which prohibited discrimination on grounds of age. Rather than denying his application for leave to appeal the judgement of the Frankfurt Administrative Court because he had meanwhile reached the age of 65, the Higher Administrative Court of Kassel, in its decision of 24 September 2002, would have been bound to interpret his application as a motion for a declaratory judgement (*Fortsetzungsfeststellungsklage*) on the unlawfulness of the Ministry's conduct. For the author, the Court's failure to proceed accordingly amounted to a denial of justice.

Issues and proceedings before the Committee

6.1 Before considering any claims contained in a communication, the Human Rights Committee must, in accordance with article 87 of its rules of procedure, decide whether or not it is admissible under the Optional Protocol to the Covenant.

6.2 The Committee takes note of the State party's invocation of its *ratione temporis* reservation, as well as the author's arguments as to the applicability of that reservation. While acknowledging the force of the author's argument that the reservation's reference to "a violation [...] having its origin in events occurring prior to the entry into force of the Optional Protocol" may give rise to different interpretations concerning the causes and chronology leading to the alleged violation, the Committee observes that, in the present case, it need not pronounce itself on the issue of applicability of the reservation, if the author's communication is inadmissible on other grounds.

6.3 In this regard, the Committee has noted the State party's argument that the author has neither appealed the decision of 13 July 1999 of the Kassel Higher Administrative Court to the Federal Administrative Court, nor filed a constitutional complaint to the Federal Constitutional Court, and thus has failed to exhaust domestic remedies. It has also noted the author's argument that these remedies would have been futile in the light of other decisions taken by these Courts.

6.4 As regards the effectiveness of an appeal against the decision of the Kassel Higher Administrative Court in the first set of proceedings, the Committee recalls that the Court, in its decision of 13 July 1999, denied leave to appeal, informing the author that this denial could only be challenged on the basis of higher jurisprudence supporting his claims, procedural flaws, or if the general importance of his case could be substantiated. The Committee further recalls that the Court confirmed the Ministry's refusal to appoint the author to a civil servant post, inter alia, by reference to two cases decided by the Federal Administrative Court. It considers that the author has sufficiently substantiated the similarity between these cases and his own case. It was therefore reasonable for him to expect that an appeal against the decision of the Kassel Higher

Administrative Court would have been futile, after that Court had dismissed his claim on similar grounds. The author was therefore not required to challenge the Court's denial to grant leave to appeal for purposes of preparing an appeal to the Federal Administrative Court.

6.5 A different question is whether the author was required to challenge the Kassel Higher Administrative Court's denial to grant leave to appeal in preparation of a constitutional complaint to the Federal Constitutional Court. The Committee recalls that, in addition to ordinary judicial and administrative appeals, authors must also avail themselves of all other judicial remedies, including constitutional complaints, to meet the requirement of exhaustion of all available domestic remedies, insofar as such remedies appear to be effective in the given case and are de facto available to an author.[4] The Committee considers that the author has not shown that the Federal Constitutional Court's jurisprudence invoked by him would *ab initio* have precluded any prospect of success of a constitutional complaint. Similarly, the fact that the Federal Constitutional Court rejected his constitutional complaint in the second set of proceedings cannot be invoked by him to demonstrate the futility of such a complaint in the first set of proceedings. For purposes of article 5, paragraph 2 (b), of the Optional Protocol, the prospect of success of a domestic remedy must be assessed from an *ex ante* perspective to serve as a justification for not exhausting domestic remedies. Lastly, any failure of the author's privately retained counsel to inform him of the requirement, under article 5, paragraph 2 (b), to exhaust domestic remedies must be attributed to the author rather than to the State party.[5] The Committee therefore concludes that the author's claims related to the first set of proceedings are inadmissible under article 5, paragraph 2 (b), of the Optional Protocol.

6.6 Insofar as the author's claims relate to the second set of proceedings, the Committee recalls that the Hessian Ministry of Science and Arts rejected his application to re-open the proceedings as lodged out of time and that the Frankfurt Administrative Court confirmed this decision, in the absence of a change of the facts or the law which would have justified re-opening proceedings. It also notes that, by the time the author submitted his renewed application for appointment to the status of civil servant on 24 August 2001, he had almost reached the retirement age of 65 years, after which appointment to the status of civil servant was no longer possible (see the decision of 24 September 2002 of the Higher Administrative Court of Kassel denying leave to appeal the judgement of the Frankfurt Administrative Court on that ground). The Committee recalls its constant jurisprudence that it is generally for the courts of States parties to the Covenant to review the facts and evidence, or the application of domestic legislation, in a particular case, unless it can be shown that such review or application was clearly arbitrary or amounted to a denial of justice, or that the court otherwise violated its obligation of independence and impartiality.[6] It considers that the author has failed to substantiate, for purposes of admissibility, that the decision of the Frankfurt Administrative Court not to re-open *res judicata* proceedings or the Kassel Higher Administrative Court's denial to grant leave to appeal that decision amounted to arbitrariness or to a denial of justice. In the Committee's view, the author has not substantiated, for purposes of admissibility, that the fact that the Higher Administrative Court did not interpret his application for leave to appeal as a motion for a declaratory judgement amounted to a denial of justice, in the absence of any pending proceedings under which such a motion could have been entered. It follows that this part of the communication is inadmissible under article 2 of the Optional Protocol.

7. The Human Rights Committee therefore decides:

(a) That the communication is inadmissible under articles 2 and 5, paragraph 2 (b), of the Optional Protocol;

(b) That this decision shall be communicated to the State party and to the authors.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the Committee's annual report to the General Assembly.]

Notes

[1] Upon ratification of the Optional Protocol, the State Party entered the following reservation: "The Federal Republic of Germany formulates a reservation concerning article 5 paragraph 2 (a) to the effect that the competence of the Committee shall not apply to communications:

(a) Which have already been considered under another procedure of international investigation or settlement, or;

(b) By means of which a violation of rights is reprimanded having its origin in events occurring prior to the entry into force of the Optional Protocol for the Federal Republic of Germany;

(c) By means of which a violation of article 26 of the [said Covenant] is reprimanded, if and insofar as the reprimanded violation refers to rights other than those guaranteed under the aforementioned Covenant."

[2] The author refers to general comment No. 25 [57]: The right to participate in public affairs, voting rights and the right of equal access to public service (art. 25), 1996, at para. 23.

[3] CCPR, general comment No. 24 [52]: Issues relating to reservations made upon ratification or accession to the Covenant or the Optional Protocols thereto, or in relation to declarations under article 41 of the Covenant (1994), at para. 19.

[4] Communication No. 1003/2001, *P.L. v. Germany*, decision on admissibility adopted on 22 October 2003, at para. 6.5; communication No. 1188/2003, *Riedl-Riedenstein et al. v. Germany*, decision on admissibility adopted on 2 November 2004, at para. 7.2.

[5] Communication No. 867/1999, *Smartt v. Guyana*, Views adopted on 6 July 2004, at para. 5.4.

[6] Communication No. 1138/2002, *Arenz et al. v. Germany*, decision on admissibility adopted on 24 March 2004, at para. 8.6; communication No. 1188/2003, *Riedl-Riedenstein et al. v. Germany*, decision on admissibility adopted on 2 November 2004, at para. 7.3.

GG. Communication No. 1417/2005, *Ounnane v. Belgium* (Decision adopted on 28 October 2005, eighty-fifth session)*

Submitted by: Mr. J.O., Mrs Z.S, and their daughter S. O., (not represented by counsel)

Alleged victim: The authors

State party: Belgium

Date of communication: 24 September 2004 (initial submission)

Subject matter: Effective representation in civil proceedings

Procedural issues: Exhaustion of domestic remedies; failure to sufficiently substantiate allegations for purposes of admissibility; inadmissibility *ratione materiae*

Substantive issues: Inability to obtain redress in a civil suit due to alleged mishandling of legal representation; undue delay

Articles of the Covenant: None

Articles of the Optional Protocol: 2; 3; 5, paragraph 2 (a)

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 28 October 2005,

Adopts the following:

Decision on admissibility

1. The authors of the communication are Mr. J.O., a Belgian national born in 1951 and his companion, Mrs. S.Z., a Belgian resident born in 1970. They submit the communication on their behalf and on behalf of their child S., a Belgian national born in 1999, and claim to be victims of violations of their human rights by Belgium, in particular of all of their "judicial rights", rights under the United Nations Charter, the Universal Declaration of Human Rights, and the

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* The following members of the Committee participated in the examination of the present communication: Mr. Nisuke Ando, Mr. Prafullachandra Natwarlal Bhagwati, Mr. Alfredo Castillero Hoyos, Ms. Christine Chanet, Mr. Maurice Glèlè Ahanhanzo, Mr. Edwin Johnson, Mr. Walter Kälin, Mr. Ahmed Tawfik Khalil, Mr. Rajsoomer Lallah, Mr. Michael O'Flaherty, Ms. Elisabeth Palm, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Ivan Shearer, Mr. Hipólito Solari-Yrigoyen, Ms. Ruth Wedgwood and Mr. Roman Wieruszewski.

International Covenant on Civil and Political Rights. Although the authors do not invoke any specific provision of the Covenant, the communication appears to raise issues under articles 2, paragraph 3 (b); 14; and 26. The authors are not represented by counsel. The Covenant and the Optional Protocol entered into force for the State party on 21 July 1983 and 17 August 1994, respectively.

Factual background

2.1 From the documents submitted to the Committee, it transpires that in 1992, Mr. O., then a taxi driver, was the victim of an assault by another taxi driver and as consequence was declared temporarily unable to work.

2.2 On 15 November 1999, while the author and his pregnant companion were travelling in a public bus in Brussels, a car crashed into the bus. Allegedly, the author and his companion were thrust into to the seats in front of them and suffered injuries. The author's companion was hospitalized and gave birth to their daughter on 21 November 1999. According to the authors, their daughter has been affected by the accident, in that she is suffering from growth problems.

2.3 From the multiple documents submitted by the authors, it transpires that they are parties to different proceedings related to the above events. For instance, in 1994, the author contested the decision of a Mutual Insurance company to suspend his work incapacity entitlements starting from 12 November 1993. Allegedly, on 11 September 2001, the Brussels Labour Court (Cour du Travail de Bruxelles) decided in the author's favour. The author claims however, that the delay of the procedure - 7 years - constitutes undue delay that he imputes to omissions of his lawyer.

2.4 In another procedure, the author was opposed to an insurance company, in relation to the reimbursement of a disability insurance premium. He allegedly had contracted a disability insurance with the company in 1992, and following his recognition as disabled person in 1993, he requested the payment of disability pension. The company disagreed, claiming that the author's disability existed, in fact, prior to the conclusion of the contract and that it was covered by an exemption clause to this effect. Allegedly, on 17 January 1996, the Brussels First Instance Tribunal ordered an expert medical opinion, as the company and the author disagreed on the expert to examine the author. In his report, the designated expert, Dr. I., confirmed the company's version. The author contests the expert's conclusion and claims that he was partial.

2.5 A third set of proceedings relate to the author's litigation with the insurance company of his employer in 1992, where the author had requested the payment of indemnities for his incapacity to work. In fact, after the author's accident of 1992, he was declared by a medical expert to be 100 per cent fit to work with effect of 1 January 1993. In 1996, however, another medical expert concluded that, following the 1992 accident, the author displayed a 66 per cent inability to work. On 10 March 1998, the author complained against the insurer to the Brussels Labour Court (Cour du Travail de Bruxelles). On 11 December 1998, the Court rejected the author's claim as having been submitted out of time. The author requested a revision of this decision and invoked force majeure. By judgement of 20 November 2000, the Court rejected his request. In this regard, the author claims a violation of his right to defence, as his lawyer allegedly did not respect the statutory appeal deadline and was responsible for the prescription of his action.

2.6 A final set of procedures was conducted by the authors against the insurance company of the car driver responsible for the 1999 accident. The authors claimed that they suffered serious injuries and requested reparation. The insurance company contested this claim and requested a medical opinion to verify the consequences of the accident for the authors' health. The medical expert issued his report on 4 July 2005; he allegedly concluded that the authors did not present any evidence of injuries attributable to the accident. The authors contest the expert's conclusion and claim a violation of their right to defence, as the designated medical expert allegedly defended the company's interests. They also complain about their lawyer who proposed this expert.

2.7 The authors explain that they have appealed to several institutions and submit copies of their complaints (Ministry of Justice, First Minister, etc), claiming various unspecified violations of their rights. On 24 February 2004, and in three additional letters of 28 July 2005, they enumerate several alleged procedural violations in the proceedings involving them, and have filed a complaint in the Brussels First Instance Tribunal. They claim violations of their rights and complain about the misconduct of several of the lawyers who represented them, and also about different representatives of the Brussels Bar who allegedly "covered" these lawyers, and about the alleged partiality of the medical expert who investigated the effects on them of the 1999 accident. On 10 May 2005, an examining magistrate of the First Instance Tribunal informed them that their case was with the Federal Police, which would convoke them shortly.

The complaint

3.1 The authors do not invoke particular provisions of the Covenant. In essence, they claim that due to their counsels' and a medical expert's misconduct, the State party has allegedly mishandled their cases as presented in paragraphs 2.1 to 2.7 above. They explain that they are unable to obtain redress of the situation in the State party as lawyers do not perform their work properly, whereas they have no more (financial) means to pay for their defence. They also claim that their cases have not been resolved since 1992 (in relation to the case of Mr. O.) and 1999 (for the bus accident), which is said to constitute an undue delay. These claims may raise issues under articles 2, paragraph 3 (b), and 14, of the Covenant.

3.2 Allegedly, due to the authorities' acts or omissions, their daughter does not receive any social benefits (allocation).

3.3 Finally, the authors also claim that they are victims of racial discrimination by the State party, without further substantiating this claim, which could raise issues under article 26 of the Covenant.

Issues and proceedings before the Committee

4.1 Before considering any claims contained in a communication, the Human Rights Committee must, in accordance with rule 93 of its rules of procedure, decide whether or not it is admissible under the Optional Protocol to the Covenant.

4.2 As required by article 5, paragraph 2 (a), of the Optional Protocol, the Committee has ascertained that a similar complaint submitted by the author was declared inadmissible by the European Court for Human Rights on 7 November 2003 (application No. 16793/03), as "manifestly ill-founded". Article 5, paragraph 2 (a), however, does not preclude the Committee from examining the present communication as the issue is no longer being examined by the European Court and the State party has formulated no reservation under article 5, paragraph 2 (a) of the Optional Protocol.

4.3 The Committee has noted the authors' claims that, firstly, the State party has violated their human rights, due to the alleged mishandling of their cases in relation to the situation in which they have found themselves following the accidents of 1992 and 1999. It observes that the author's claims primarily relate to the assessment of elements of facts and evidence in the case. It recalls that it is generally for the courts of States parties to the Covenant to evaluate facts and evidence in a particular case, unless it can be ascertained that it was clearly arbitrary or amounted to a denial of justice.[1] The material before the Committee does not show that the various proceedings in the State party suffered from such defects. Accordingly, the Committee considers that the author has failed to sufficiently substantiate his claim, for purposes of admissibility, and that this part of the communication is inadmissible under article 2 of the Optional Protocol.

4.4 Secondly, the Committee notes that the conduct of a privately hired defence lawyer in civil proceedings is not protected as such by any provision of the Covenant. Article 14, paragraph 3 (d) obliges States parties to provide legal aid only within the framework of criminal proceedings. The Committee therefore concludes that this claim is incompatible *ratione materiae* with the provisions of the Covenant, under article 3 of the Optional Protocol.

4.5 As far as the author's claim that their proceedings suffered from undue delay, the Committee notes that from the material before it, it cannot be established that this delay can in any way be imputed to the State party. Rather, the delays appear to be the consequence of the authors' successive actions against the insurance companies, as well as their repeated challenges to the conclusions of experts and complaints about their lawyers. In the circumstances, the Committee considers that the author has failed to sufficiently substantiate, for purposes of admissibility, this particular claim. Accordingly, this part of the communication is inadmissible under article 2 of the Optional Protocol.

4.6 The Committee has further taken note of the authors otherwise unsubstantiated claims that their daughter is not entitled to social benefits, and that they are victims of racial discrimination. The Committee considers that the authors have failed to sufficiently substantiate, for purposes of admissibility, these claims, which accordingly are inadmissible under article 2 of the Optional Protocol.

5. The Human Rights Committee therefore decides:

(a) That the communication is inadmissible under article 2 and 3 of the Optional Protocol;

(b) That this decision shall be transmitted to the State party and to the author, for information.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the Committee's annual report to the General Assembly.]

Note

[1] See for example communication No. 541/1993, *Errol Simms v. Jamaica*, Inadmissibility decision adopted on 3 April 1995, para. 6.2.

HH. Communication No. 1420/2005, *Linder v. Finland* (Decision adopted on 28 October 2005, eighty-fifth session)*

Submitted by:	Eugene Linder (not represented)
Alleged victim:	The author
State party:	Finland
Date of communication:	1 April 2005 (initial submission)
Subject matter:	Alleged failure to reimburse medical expenses to a national residing abroad
Procedural issues:	Committee's incompetence to examine violations of rights not protected by the Covenant
Substantive issues:	Right to health
Articles of the Covenant:	2, paragraph 3 (b); 7; 14; 26
Articles of the Optional Protocol:	2, 3, 5, paragraph 2 (b)

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 28 October 2005,

Adopts the following:

Decision on admissibility

1. The author of the communication (initial submission of 1 April 2005) is Eugene Linder, a Finish citizen. Although the author does not invoke any specific provision of the Covenant, the communication appears to raise issues under articles 2, paragraph 3 (b); 7; 14; and 26 of the Covenant. He is not represented by counsel. The Optional Protocol entered into force for Finland on 23 March 1976.

Factual background

2.1 On 11 November 2004, the author, a Finnish citizen, was admitted to the emergency ward of a hospital in Germany (neither the name of the hospital nor the city is provided). While in hospital (exact date not specified), he received a fax from the Social Insurance Institution of Finland (KELA), requesting him to provide confirmation of his residence in Finland. Such information was necessary as Finnish residents are entitled to the coverage by KELA of their medical expenses abroad only when they travel for a short period of time. Finnish nationals resident abroad for longer periods have to contract a health insurance in their country of residence. Allegedly, the author was unable to submit the necessary information from the hospital, and he asked KELA to inform him exactly what information (and in what form) was needed; allegedly, he received no answer. He was discharged form the hospital on 20 November 2004. He explains that he cannot return immediately to Finland because his health condition is not stable enough to allow him a long flight.

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* The following members of the Committee participated in the examination of the present communication: Mr. Nisuke Ando, Mr. Prafullachandra Natwarlal Bhagwati, Mr. Alfredo Castillero Hoyos, Ms. Christine Chanet, Mr. Maurice Glèlè Ahanhanzo, Mr. Edwin Johnson, Mr. Walter Kälin, Mr. Ahmed Tawfik Khalil, Mr. Rajsoomer Lallah, Mr. Michael O'Flaherty, Ms. Elisabeth Palm, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Ivan Shearer, Mr. Hipólito Solari-Yrigoyen, Ms. Ruth Wedgwood and Mr. Roman Wieruszewski.

2.2 Allegedly, on 25 November 2004, KELA considered his case and found him "not eligible for coverage by the Finnish social security system". According to the author, this decision was, inter alia, based on the ground that no documents were provided to KELA proving his residence in Finland, despite the fact that he had not been informed what documents he had to provide, and that even if he had known, he still would not be able to provide them from the hospital.

2.3 The author claims that since his discharge from hospital, he was left without any medical attention. Allegedly, notwithstanding that he has contacted several Finnish officials by telephone, has explained his problems to them and has indicated that his case constituted a medical emergency, his claims were ignored or he did not receive any reasoned advice as to what action he should undertake. From the documents submitted to the Committee, it transpires that on 23 December 2004, he had appealed to KELA's Appeal Tribunal and that appeal is pending.

2.4 On 27 December 2004, the author complained to the Chancellor of Justice's Office about the "unacceptable behaviour of officials at various bodies and organizations in Finland". The Chancellor of Justice rejected his complaint on 24 January 2005, because of his inability to interfere in cases that are pending before bodies undertaking a review or in cases under appeal, the complaint regarding the author's residence in Finland in sincerelation to his eligibility for social insurance was still under examination by KELA's Appeal Tribunal.

2.5 On 26 February 2005, the author again wrote to the Chancellor of Justice. He reiterated that his case was one of medical emergency, and explained that his repeated attempts to contact different officials of KELA in Tampere or Helsinki and the Ministry of Health in order to obtain clarifications of their position on his case were unsuccessful. He claimed that the Chancellor's narrow interpretation of his complaint as being only about KELA was incorrect, as it contained a long list of names and institutions that "failed in their duty". In the author's opinion, this constituted sufficient ground for the Chancellor to start an investigation. He expressed his "incomprehension" about the delay (one month, according to the author) needed by the Chancellor to inform the author of his "unwillingness" to deal with his case, while it was clear that this was a case of health emergency and prompt action was needed. The author urged the Chancellor to investigate the actions of Finnish officials, guilty, according to him, of (a) a discrimination based on his ethnic origin, (b) of "criminal negligence" in leaving him without medical assistance, (c) a violation of his human rights and of his rights as a patient. He further explained that he is not an ethnic Finn, speaking Finnish with a foreign accent indicating to any native Finn "that he is a foreigner with a Finnish passport". In his letter to the Chancellor, the author also alleged a breach of procedural obligations of the Appeal Tribunal. He explained that on 27 December 2004, he applied to the KELA Appeal Tribunal in Helsinki, but that he received no confirmation of receipt. On 5 January 2005, he had a phone conversation with the

Chairman of the Appeal Tribunal who, notwithstanding that the author had explained that his case was a "medical emergency", insisted that the average time of processing individual complaints by the Appeal Tribunal was about ten months. The author held several subsequent conversations with the Chairman, and received his written confirmation that the Appeal Tribunal was dealing with his case as of 17 January 2005. In the author's opinion, as expressed in his letter to the Chancellor, the alleged negligence by the Appeal Tribunal constituted a disproportionate interference with his right to access to a fair hearing and appeal, while the length of the proceedings are qualified as "unacceptable" given the urgent nature of his case. He claimed that "criminal negligence" on the part of the Finnish authorities, including medical doctors, amounts to a serious violation of his human rights and his rights as a patient in need of medical help. The Chancellor replied to this letter on 23 March 2005 reiterating his previous position that he could not intervene in the case as long as it was pending with the Appeal Tribunal.

2.6 By letter of 22 February 2005, the chairman of the Appeal Tribunal explained to the author that the Finish social security system is based on the residence principle and that EU citizens working abroad enjoy social security in the country of employment. Thus, medical treatment in Germany could only be compensated if the author was a resident of Finland. Because there were no data available showing that this was indeed the case, it was necessary for the author to clarify this issue and show that he was still residing in Finland.

The complaint

3.1 The author does not invoke specific provisions of the Covenant. In substance, his claims appear to relate to the alleged violation by the Finnish authorities of his right to health and the absence of a fair and expeditious hearing (article 14 of the Covenant).

3.2 He adds that since 20 November 2004, the State party's authorities have failed to provide him with any assistance in his problems while his case constitutes a "medical emergency", and his health is affected. In the author's opinion, the authorities' alleged negligence constitutes a violation of his right to access to a fair hearing and appeal, while the length of the proceedings are qualified as "unacceptable", given the urgent nature of his case (articles 2, paragraph 3 (b) and 14, of the Covenant).

3.3 The author claims that the Finnish authorities' disregard for his right to health amounts to inhuman and degrading treatment (article 7 of the Covenant). He asks the Committee to request interim measures of protection from Finland, to prevent irreparable damage to his health.

3.4 Finally, and without further substantiation of this allegation, the author claims that he is a victim of discrimination on the grounds of his ethnic origin and language (article 26 of the Covenant).

Issues and proceedings before the Committee

4.1 Before considering any claims contained in a communication, the Human Rights Committee must, in accordance with rule 93 of its rules of procedure, decide whether or not it is admissible under the Optional Protocol to the Covenant.

4.2 The Committee has ascertained that the same matter is not being examined under another procedure of international investigation or settlement for the purposes of article 5, paragraph 2 (a), of the Optional Protocol.

4.3 The Committee notes that the author claims to be a victim of violations by Finland of his right to health, given the State party's failure to provide him with emergency medical assistance, and to cover his medical expenses in Germany, following his hospitalization there. The Committee observes that the right to health, as such, is not protected by the provisions of the Covenant. Accordingly, this part of the communication is inadmissible *ratione materiae*, as incompatible with the provisions of the Covenant, under article 3 of the Optional Protocol.

4.4 In relation to the author's claim that since November 2004, the State party's authorities have failed to provide redress for his situation and that their negligence constituted a violation of his right to access to a fair hearing and appeal, the Committee notes that the author had appealed to different officials and institutions in the State party and that his appeal in relation to his eligibility for Finnish Social Insurance is still pending before the KELA Appeal Tribunal. It has also noted the author's contention that exhaustion of domestic remedies would be "unreasonably prolonged", as the procedures before the Appeal Tribunal last approximately 10 months, and that he considers such length to be "unacceptable", given the urgent nature of his case. The Committee also observes that the author has failed to bring his case before one of the State party's ordinary tribunals to seek redress of his situation. It recalls that the requirement of exhaustion of domestic remedies, which allows the State party to remedy an alleged violation before the same issue may be raised before the Committee, obliges authors to first raise the substance of their claims submitted to the Committee before domestic courts. As the author has failed first to raise the alleged violations of his rights before domestic courts, the Committee considers that his communication is also inadmissible under article 5, paragraph 2 (b), of the Optional Protocol.

4.5 The Committee has noted the author's claims that the authorities' disregard for his case amounts to inhuman and degrading treatment, and that he is a victim of discrimination based on his ethnic origin. In support of his latter claim, he explains that he speaks the Finnish language with an accent and that it would be easy for a native Finn to assume that he was a "foreigner with a Finnish passport". The Committee considers that the author has failed sufficiently to substantiate, for purposes of admissibility, these two claims, and that this part of the communication is inadmissible under article 2 of the Optional Protocol.

5. The Human Rights Committee therefore decides:

(a) That the communication is inadmissible under articles 2, 3, and 5, paragraph 2 (b), of the Optional Protocol;

(b) That this decision shall be transmitted to the author and to the State party, for information.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the Committee's annual report.]

II. Communication No. 1434/2005, *Fillacier v. France* (Decision adopted on 27 March 2006, eighty-sixth session)*

Submitted by:	Claude Fillacier (represented by counsel)
Alleged victim:	The author
State party:	France
Date of communication:	24 May 2004 (initial submission)
Subject matter:	Reincorporation in the French public service following transfer from Algeria, request for compensation
Procedural issues:	Abuse of the right of submission, State party's reservation
Substantive issues:	Equal access to public employment
Articles of the Covenant:	2, 25 (c) and 26
Articles of the Optional Protocol:	3 and 5, paragraph 2 (a)

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 27 March 2006,

Adopts the following:

Decision on admissibility

1. The author of the communication, dated 24 October 2005, is Claude Fillacier, a French citizen born at Bône in Algeria on 3 March 1927. He claims to have been a victim of violations by France of articles 2, 25 (c) and 26 of the International Covenant on Civil and Political Rights. He is represented by counsel, Alain Garay. The Optional Protocol entered into force for France on 17 May 1984.

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* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Nisuke Ando, Mr. Prafullachandra Natwarlal Bhagwati, Mr. Maurice Glèlè Ahanhanzo, Mr. Edwin Johnson, Mr. Walter Kälin, Mr. Ahmed Tawfik Khalil, Mr. Rajsoomer Lallah, Mr. Michael O'Flaherty, Ms. Elisabeth Palm, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Ivan Shearer, Mr. Hipólito Solari-Yrigoyen and Mr. Roman Wieruszewski.

Pursuant to rule 90 of the Committee's rules of procedure, Ms. Christine Chanet did not participate in the consideration of this communication.

The facts

2.1 Between October 1953 and March 1963, the author occupied a variety of senior administrative posts in a number of social agencies in Algeria, during the period when it was part of France. From June 1960 onwards, he was simultaneously Deputy Director of the "Bône Assurances Sociales" regional mutual social insurance fund for farmers and Deputy Director of the "Bône-Assurance" regional mutual insurance fund for farmers.

2.2 The author left Algeria for France in March 1963, following decolonization. On 5 March 1963, he asked to be placed in an equivalent post in a similar social insurance agency for farmers in France. This request was based on article 2 of decree No. 62-941 of 9 August 1962 relating to conditions for the placement of permanent French personnel of the agencies listed in article 3 of order No. 62-401 of 11 April 1962 relating to conditions for the incorporation in the public service in metropolitan France of officials and agents of the public service in Algeria and the Sahara.

2.3 By letter of 11 May 1963, the French Ministry of Agriculture informed the author that he could not be placed because of his "shared" employment between the "Bône Assurances Sociales" regional mutual social insurance fund for farmers, which administered a legally obligatory insurance scheme, and the "Bône-Assurance" regional mutual insurance fund for farmers, a body not covered by order No. 62-401 of 11 April 1962. The author replied in a letter dated 11 July 1963. The Minister confirmed his decision by letter dated 29 July 1963.

2.4 The author endeavoured unsuccessfully to secure placement from various authorities. Eventually he lodged with the Administrative Court in Toulouse applications for placement and compensation for injury resulting from failure to place him in the corresponding grade in metropolitan France. His applications were denied on 27 June 1986. The author then appealed. On 8 June 1990 the Council of State upheld the ruling of the Toulouse Administrative Court. On 7 January 2004, the author brought the matter to the attention of the European Court of Human Rights, which on 9 November 2004 declared his application to be inadmissible on grounds of late submission.

The complaint

3.1 The author states that his complaint was not "examined" by the European Court of Human Rights because his application was declared inadmissible on purely procedural grounds. He considers that the State party's reservation does not apply to his case. The author goes so far as to challenge the lawfulness of the reservation, which he says infringes the principle of access to justice.

3.2 Although his communication relates to events which took place before the State party ratified the Optional Protocol, the author considers that the Human Rights Committee becomes competent if, after the entry into force of the Optional Protocol, the acts in question continue to produce consequences which themselves constitute violations of the Covenant.[1] He also points out that his application is admissible since the Covenant and the Optional Protocol lay down no deadline for the submission of communications.

3.3 The author considers that the French authorities failed to guarantee or protect the rights enumerated in article 25, paragraph (c), taken together with articles 2 and 26 of the Covenant, thereby fundamentally infringing his right to employment and exercising discrimination based on his circumstances and his nationality. He considers that he suffered discrimination as compared with other officials who at that time were simultaneously performing corresponding and identical functions in metropolitan France, in the Mutualité Agricole.[2] He cites the Human Rights Committee's general comment No. 25 (57), which states that "to ensure access on general terms of equality, the criteria and processes for appointment, promotion, suspension and dismissal must be objective and reasonable". Consequently, the author considers that the criteria used to draw a distinction in his case, namely the nature of the performance of a management function within the regional mutual social insurance fund for farmers, as interpreted by the State party, clearly underlie a difference in treatment which is not based on an objective and reasonable criterion.

3.4 Concerning the exhaustion of domestic remedies, the author states that, following the ruling handed down by the Council of State on 8 June 1990, no further domestic remedies are available to him.

3.5 The author requests the Committee to rule on the granting of just satisfaction to the author, who has suffered serious injury owing to the failures of the French administration. He also asks that the State party should be ordered to pay him the costs he incurred when bringing actions in the French courts.

Issues and proceedings before the Committee

4.1 Before considering any claim contained in a communication, the Human Rights Committee must, in accordance with rule 93 of its rules of procedure, decide whether or not it is admissible under the Optional Protocol to the Covenant on Civil and Political Rights.

4.2 In accordance with article 5, paragraph 2 (a), of the Optional Protocol, the Committee has ascertained that a similar complaint lodged by the author was declared inadmissible on grounds of late submission by the European Court of Human Rights on 18 November 2004 (application No. 2188/04). The Committee also points out that at the time of its accession to the Optional Protocol, the State party entered a reservation with regard to article 5, paragraph 2 (a), of the Optional Protocol indicating that the Committee shall not have competence to consider a communication from an individual if the same matter is being examined or has already been considered under another procedure of international investigation or settlement. However, the Committee finds that the European Court did not "examine" the case in the meaning of article 5, paragraph 2 (a), of the Optional Protocol insofar as its ruling dealt only with a question of procedure. Consequently, no issue arises with regard to article 5, paragraph 2 (a), of the Optional Protocol, as interpreted in the light of the State party's reservation.

4.3 The Committee notes the delay of 15 years in this case and observes that there are no explicit time limits for submission of communications under the Optional Protocol. However, in certain circumstances, the Committee is entitled to expect a reasonable explanation justifying such a delay. In the present case, the Council of State handed down its ruling on 8 June 1990, over 15 years before the communication was submitted to the Committee, but no convincing explanation has been provided to account for such a delay. In the absence of an explanation, the

Committee considers that submitting the communication after such a long delay amounts to an abuse of the right of submission, and finds the communication inadmissible under article 3 of the Optional Protocol[3] and rule 93 (3) of the rules of procedure.

5. Consequently, the Human Rights Committee decides:

(a) That the communication is inadmissible under article 3 of the Optional Protocol and rule 93 (3) of the rules of procedure;

(b) That this decision shall be communicated to the State party and the author for information.

[Adopted in English, French and Spanish, the French text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the Committee's annual report to the General Assembly.]

Notes

[1] See *Lovelace v. Canada*, communication No. 24/1977, Views adopted on 30 July 1981, para. 7.3.

[2] See *Gueye v. France*, communication No. 196/1985, Views adopted on 3 April 1989, para. 9.5.

[3] See *Gobin v. Mauritius*, communication No. 787/1997, decision on admissibility adopted on 16 July 2001, para. 6.3.

JJ. Communication No. 1440/2005, *Aalbersberg v. The Netherlands* (Decision adopted on 12 July 2006, eighty-seventh session)*

Submitted by:	Aalbersberg and 2,084 other Dutch citizens (represented by counsel, N.M.P. Steijnen)
Alleged victim:	The authors
State party:	The Netherlands
Date of communication:	2 August 2005 (initial submission)
Subject matter:	Potential use of nuclear weapons by NATO alliance
Procedural issue:	Notion of "victim"
Substantive issue:	Right to life
Article of the Covenant:	6
Articles of the Optional Protocol:	1, 5 (2) (a)

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 12 July 2006,

Adopts the following:

Decision on admissibility

1.1 The authors of this communication, dated 2 August 2005, are 2,084 Dutch citizens. They claim to be victims of a violation by the Netherlands of article 6 of the Covenant. The Optional Protocol entered into force for the Netherlands on 11 March 1979. They are represented by counsel, N.M.P. Steijnen.

1.2 On 3 February 2006, the Special Rapporteur for new communications, on behalf of the Committee, determined that the admissibility of this case should be considered separately from the merits.

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* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Nisuke Ando, Mr. Prafullachandra Natwarlal Bhagwati, Mr. Alfredo Castillero Hoyos, Ms. Christine Chanet, Mr. Maurice Glèlè Ahanhanzo, Mr. Edwin Johnson, Mr. Walter Kälin, Mr. Ahmed Tawfik Khalil, Mr. Rajsoomer Lallah, Mr. Michael O'Flaherty, Ms. Elisabeth Palm, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Ivan Shearer, Mr. Hipólito Solari-Yrigoyen and Mr. Roman Wieruszewski.

Factual background

2.1 The Association of Lawyers for Peace and the authors filed a complaint in the District Court of The Hague, claiming that the potential use of nuclear weapons by the NATO alliance amounts to violations of the principles of humanitarian law, namely the prohibition to make civilians the target of a military attack, the prohibition to direct attacks against military targets which would cause excessive collateral damage to civilians and the principle of distinction between combatants and non-combatants. They sought a declaration of law to the effect that it is prohibited for the Dutch Government to cooperate in the actual deployment of nuclear weapons in general, to make available Dutch facilities for delivery for the actual use of nuclear weapons, to execute nuclear bombardments with Dutch war planes or any other means, to assist or endorse the use of nuclear weapons against residential areas, to employ nuclear weapons against military targets in populated areas and to give orders to military servicemen/women to use nuclear weapons.

2.2 By interim judgement dated 28 April 1993, in reply to the State party's plea of inadmissibility, the District Court decided that the claim could be declared admissible only if the principles of humanitarian law create direct rights for civilians. It then ordered an appearance of the parties in order to discuss the possible need for an expert report. By judgement of 13 December 1995, the District Court appointed three experts who would determine, inter alia, whether civilians can directly invoke the principles of humanitarian law at issue in the present case.

2.3 The Association of Lawyers for Peace and the authors appealed the decision and requested that the State party be ordered to cancel the NATO plans on the use of nuclear weapons and to serve notice of this cancellation to its allies. On 20 May 1999, the Court of Appeal of The Hague dismissed the appeal. It confirmed that the principles of humanitarian law must create direct rights for civilians in order for the claim to be declared admissible. It added that admissibility also required that there be a sufficiently specific interest. In the present case, the Court required that there be a realistic and specific threat of use of nuclear weapons by the State party. Such a threat had not been demonstrated by the authors. The Court found that the authors had no sufficient specific interest and that their claims had not been described in a sufficiently specific way.

2.4 The Association of Lawyers for Peace and the authors appealed to the Dutch Supreme Court. On 21 December 2001, the Supreme Court noted that, in order to decide whether the case was admissible, the alleged illegality of the acts complained of had to be considered to some extent. For this purpose, it invoked the Advisory Opinion of the International Court of Justice of 8 July 1996 which failed to declare the use of nuclear weapons illegal under all circumstances. The Supreme Court considered that it was not the task of a civil court, but that of State authorities, to make political decisions in the field of foreign policy and defence. It also considered that there was "no specific and current interest at stake", in the sense that there was no realistic threat that nuclear weapons will be used, and dismissed the appeal.

The complaint

3.1 The authors claim to be victims of a violation of article 6 of the Covenant, because the legal position adopted by the State party which recognizes the lawfulness of potential use of nuclear weapons puts many lives at risk, including their own.

3.2 The authors invoke general comment No. 14/23 on article 6 of 2 November 1984, where the Committee stated that "the designing, testing, manufacture, possession and deployment of nuclear weapons are among the greatest threats to the right to life which confront mankind today" and that "the production, testing, possession, deployment and use of nuclear weapons should be prohibited and recognized as crimes against humanity". They argue that these clear statements should not remain without any legal impact on individual complaints submitted under the Optional Protocol. Indeed, they recall that the Committee is not a political organ, but a judicial body whose statements are supposed to be legal statements which must have a legal impact.

3.3 The authors submit that their communication must be distinguished from two earlier decisions of the Committee related to the potential use of nuclear weapons.[1] They argue that these decisions were, respectively, about the deployment of nuclear weapons in the Netherlands and the testing of nuclear weapons in French Polynesia. The present communication does not concern the deployment or testing of nuclear weapons.

3.4 With regard to article 6 of the Covenant, the authors note that the State party is officially prepared to use nuclear weapons and to cooperate with such use. They argue that this position is in clear contradiction with article 6 and general comment No. 14/23. They argue further that article 6 creates positive obligations upon States parties to protect against imminent threats to the right to life posed by nuclear weapons. They also invoke general comment No. 6/16 of 27 July 1982 on article 6 in which the Committee stated that "the protection of [the] right [to life] requires that States adopt positive measures". In the present case, they claim that the State party completely and expressly denies authors any active measures of protection against the actual use of nuclear weapons. They argue that the State party has deliberately misinterpreted the Advisory Opinion delivered by the International Court of Justice of 8 July 1996.

State party's observations on admissibility of the communication

4.1 By note verbale of 17 January 2006, the State party challenges the admissibility of the communication. As a preliminary point, it recalls that the Association of Lawyers for Peace and the authors have already received a decision by the European Court of Human Rights which found that the facts did not disclose any appearance of a violation of the rights and freedoms set out in the European Convention on Human Rights or its Protocols (application No. 23698/02).

4.2 The present case is not a new situation: the authors effectively request the Committee to review two of its previous decisions.[2] The State party recalls that the authors claim that the judgement of the Supreme Court of the Netherlands of 21 December 2001 created a new situation, as compared to the situation prevailing at the time the two decisions were made by the Committee in 1993. They also claim that these two decisions exclusively address the stationing of nuclear weapons, whereas the present communication deals with the imminent use of nuclear weapons threatening their right to life. The State party refutes these claims: the Supreme Court merely refused to state that the use of nuclear weapons was a violation of humanitarian law in all cases. It argues that the ruling of the Supreme Court did not grant any greater authority to the Government with regard to the actual use of nuclear weapons, nor did it result in any greater readiness on the part of the Government to use nuclear weapons. It concludes that the ruling of the Supreme Court has not, therefore, created a new situation regarding the authors' right to life as compared to the two previous communications.

4.3 The State party rejects the authors' argument that the present communication must be distinguished from previous ones to the extent that it addresses, for the first time, the (imminent) use of nuclear weapons, rather than the stationing of nuclear weapons. There is no basis for the assertion that it has considered or is considering any imminent use of nuclear weapons. The State party recalls that, on the contrary, it put great effort into the conclusion of the Comprehensive Test Ban Treaty, repeatedly called on nuclear powers to enter into disarmament agreements, and on many occasions expressed the hope of achieving a nuclear weapon free world. It adds that the time lapsed between the judgement of the Supreme Court in 2001 and the original submission of the present communication in 2004 contradicts the authors' allegation that the use of nuclear weapons was rendered imminent by the judgement of the Supreme Court.

4.4 Secondly, the State party argues that the authors in the present communication cannot claim to be victims of a violation of article 6 of the Covenant. It invokes previous Committee decisions where it was stated that a victim has to be actually affected by the law or practice deemed to be contrary to the Covenant.[3] In the present case, it thus has to be determined whether the alleged acts or omissions committed by the State party present the authors with an existing or imminent violation of their right to life, specific to each of them. According to the State party, the authors have failed to substantiate their claims in this respect since there is no actual or imminent violation of their right to life. As to the ruling of the Supreme Court, it did not authorize the actual use of nuclear weapons in a specific case involving the rights of the authors, but merely refused to state that the use of nuclear weapons would under all circumstances be illegal under international law. The State party finds no connection between the judgement of the Supreme Court and the rights of the authors under article 6 of the Covenant. In any case, it argues that there is no basis for any allegation that it had or currently has or would ever have a policy authorising the use of nuclear weapons against its own citizens within its own territory. Consequently, the authors cannot claim to be victims, within the meaning of article 1 of the Optional Protocol, whose right to life is violated or is under any imminent prospect of violation.

4.5 Finally, the State party argues that the present communication is an attempt to use the procedure under the Optional Protocol to conduct a public debate over matters of public policy, such as support for disarmament, and that this is contrary to the Committee's jurisprudence on such use of its procedure. It notes that several of the authors are active and outspoken opponents of nuclear weapons, of military forces and weapons in general, and have sought to use national judicial fora as venues for public political debate. While it in no way seeks to limit the rights of the authors to express their opinion in a manner consistent with articles 18 and 19 of the Covenant, the State party shares the Committee's view that the procedure under the Optional Protocol is not the appropriate forum for such a debate.[4]

Authors' comments

5.1 By letter dated 17 April 2006, the authors argue that the present communication is not the same as filed with the European Court of Human Rights. They claim that the State party misrepresented their position to the extent that they did not seek a ruling that the use of nuclear weapons was in all instances a violation of humanitarian law. Instead, they wanted to submit a range of modalities of actual use of nuclear weapons to a test of legality. They insist that the legality of only concrete and realistic nuclear plans was challenged in court. They recall that the

Supreme Court ruled that the use of nuclear weapons in certain categories of situations cannot be said to be always illegal. They insist that this ruling gives the State party much more scope to resort to nuclear weapons. They add that it may lead tribunals in other States to reach the same conclusions and that the Committee must prevent this. They add that this ruling challenges the integrity of the Advisory Opinion of the International Court of Justice of 8 July 1996 concerning the legality of the threat or use of nuclear weapons and that "the Committee should seek to protect the Court's ruling".

5.2 With regard to the State party's argument that there is no imminent threat of actual use of nuclear weapons, the authors argue that discussing the imminence in connection with the actual use of nuclear weapons is of a completely different order than discussing imminence in connection with any other subject. They also recall that the International Court of Justice stated that there is an imminent threat that nuclear weapons will be used. They urge the Committee to review its position about the issue of individual complaints against imminent prospect of nuclear destruction, especially since article 6 requires States parties to adopt positive measures for the protection of the right to life.

Issues and proceedings before the Committee

6.1 Before considering any claim contained in a communication, the Human Rights Committee must, in accordance with rule 93 of its rules of procedure, decide whether or not it is admissible under the Optional Protocol to the Covenant.

6.2 As required by article 5, paragraph 2 (a), of the Optional Protocol, the Committee has ascertained that a similar complaint submitted by the authors was declared inadmissible by the European Court for Human Rights on 5 September 2002 (application No. 23698/02) because it did not disclose any appearance of a violation of the rights and freedoms set out in the Convention or its Protocols. Article 5, paragraph 2 (a), however, does not preclude the Committee from examining the present communication as the issue is no longer being examined by the European Court and the State party has formulated no reservation under article 5, paragraph 2 (a) of the Optional Protocol.

6.3 The Committee then must consider whether the authors are "victims" within the meaning of article 1 of the Optional Protocol. For a person to claim to be a victim of a violation of a right protected by the Covenant, he or she must show either that an act or an omission of a State party has already adversely affected his or her enjoyment of such right, or that such an effect is imminent, for example on the basis of existing law and/or judicial or administrative decision or practice. The issue in this case is whether the State's stance on the use of nuclear weapons presented the authors with an existing or imminent violation of their right to life, specific to each of them. The Committee finds that the arguments presented by the authors do not demonstrate that they are victims whose right to life is violated or under any imminent prospect of being violated. Accordingly, the Committee concludes that the authors cannot claim to be "victims" within the meaning of article 1 of the Optional Protocol.[5]

7. Accordingly, the Committee decides:

(a) That the communication is inadmissible under article 1 of the Optional Protocol;

(b) That this decision be transmitted to the State party, to the authors and to their counsel.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the Committee's annual report to the General Assembly.]

Notes

[1] See communication No. 429/1990, *E.W. et al. v. The Netherlands*, decision on inadmissibility adopted on 8 April 1993; and communication No. 645/1995, *Bordes and Temeharo v. France*, decision on inadmissibility adopted on 22 July 1996.

[2] See communication No. 429/1990, *E.W. et al. v. The Netherlands*, decision on inadmissibility adopted on 8 April 1993; and communication No. 524/1992, *E.C.W. v. The Netherlands*, decision on inadmissibility adopted on 3 November 1993.

[3] See communication No. 35/1978, *Aumeeruddy-Cziffra and 19 other Mauritian women v. Mauritius*, Views adopted on 9 April 1981, para. 9.1; communication No. 318/1988, *E.P. et al. v. Colombia*, decision on inadmissibility adopted on 25 July 1990, para. 8.2; and communication No. 429/1990, *E.W. et al. v. The Netherlands*, decision on inadmissibility adopted on 8 April 1993, para. 6.4.

[4] See communication No. 524/1992, *E.C.W. v. The Netherlands*, decision on inadmissibility adopted on 3 November 1993, para. 4.2.

[5] See communication No. 429/1990, *E.W. et al. v. The Netherlands*, decision on inadmissibility adopted on 8 April 1993, para. 6.4; and communication No. 645/1995, *Bordes and Temeharo v. France*, decision on inadmissibility adopted on 22 July 1996, para. 5.5.

KK. Communication No. 1441/2005, *Garcia v. Spain* (Decision adopted on 25 July 2006, eighty-seventh session)*

Submitted by: Apolonio García González (represented by counsel, Mr. José Luis Mazón Costa)

Alleged victim: The author

State party: Spain

Date of initial communication: 11 November 2005 (initial submission)

Subject matter: Evaluation of evidence and extent of review of criminal case against complainant on appeal by Spanish courts

Procedural issue: Failure to substantiate claims

Substantive issue: Right to have the sentence and conviction reviewed by a higher tribunal according to law

Article of the Covenant: 14, paragraph 5

Article of the Optional Protocol: 2

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 25 July 2006,

Adopts the following:

Decision on admissibility

1. The author of the communication, dated 11 November 2005, is Apolonio García González, a Spanish citizen of Venezuelan origin born in 1954. He claims to be a victim of a violation by Spain of article 14, paragraph 5, of the Covenant. The Optional Protocol entered into force for Spain on 25 April 1985. He is represented by counsel, Mr. José Luis Mazón Costa.

Factual background

2.1 In August 1997, the author participated, together with eight other persons, in a drug trafficking operation consisting in transporting cocaine from Venezuela to Spain. This operation was dismantled by the Spanish Police at the harbour of Fuerteventura (Canary Islands), where 60 kgs of cocaine intended for delivery in Las Palmas de Gran Canaria were confiscated.

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* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Nisuke Ando, Mr. Prafullachandra Natwarlal Bhagwati, Mr. Maurice Glèlè Ahanhanzo, Mr. Edwin Johnson, Mr. Walter Kälin, Mr. Ahmed Tawfik Khalil, Mr. Rajsoomer Lallah, Ms. Elisabeth Palm, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Ivan Shearer and Mr. Hipólito Solari-Yrigoyen.

2.2 On 25 July 2001, the Spanish National High Court of Justice (*Audiencia Nacional*) indicted the author for aggravated offences against public health and sentenced him to 16 years and 10 months' imprisonment and payment of a fine of 200 million Ptas (€1,202,000).

2.3 The author appealed to the Spanish Supreme Court, alleging a violation of the right to judicial remedy and the right of defence, based on alleged irregularities in the proceedings regarding the non-admittance of some evidence presented by the author, on the alleged basis that the crime was provoked artificially and on the allegedly discretionary appreciation by the Court of the aggravated nature of the crime. On 23 January 2003, the Supreme Court dismissed both grounds of appeal.

2.4 The author acknowledges that he has not submitted an application for *amparo* to the Constitutional Court. He contends that this remedy would have no prospect of success, given that the Spanish Constitutional Court has repeatedly rejected applications for *amparo* against conviction and sentence.

2.5 The author acknowledges that in December 2003 he had sent a letter to the European Court of Human Rights stating his intention to submit his case, although his complaint was never formally filed and therefore his case has not been examined by the European Court.

The complaint

3. The author claims to be a victim of a violation of article 14, paragraph 5, of the Covenant, because he could not obtain a proper re-evaluation of the evidence presented in his case given the limited nature of the Spanish remedy of *cassation*.

Issues and proceedings before the Committee

4.1 Pursuant to rule 93 of its rules of procedure, before considering any claim contained in a complaint, the Human Rights Committee must determine whether it is admissible under the Optional Protocol to the Covenant on Civil and Political Rights.

4.2 The Committee has ascertained, as required under article 5, paragraph 2 (a), of the Optional Protocol, that the same matter is not being examined under another procedure of international investigation or settlement. It notes that the author's case was never formally filed to the European Court of Human Rights and that, therefore, this Court never examined it.

4.3 The Committee takes note of the author's allegations that he did not obtain a proper re-evaluation of his case on appeal. However, the Committee also notes that it transpires from the text of the judgement of the Supreme Court that the Court did deal extensively with the assessment of the evidence by the court of instance. In particular, the Supreme Court examined the issue of admissibility of the evidence presented by the author in light of the jurisprudential principles of pertinence and relevance and concluded that the court of instance correctly rejected the evidence on the basis that it did not relate to the object of the case. The claim regarding article 14, paragraph 5, therefore, is insufficiently substantiated for purposes of admissibility. The Committee concludes that this claim is inadmissible under article 2 of the Optional Protocol.

4.4 The Human Rights Committee therefore decides:

(a) That the communication is inadmissible under article 2;

(b) That the decision be transmitted to the State party and to the author.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the Committee's annual report to the General Assembly.]

LL. Communication No. 1444/2006, *Zaragoza Rovira v. Spain* (Decision adopted on 25 July 2006, eighty-seventh session)*

Submitted by:	José Zaragoza Rovira (represented by Mr. Marco Rodríguez-Farge Ricetti)
Alleged victim:	The author
State party:	Spain
Date of communication:	13 January 2006 (initial submission)
Subject matter:	Conviction allegedly based on evidence obtained illegally
Procedural issue:	Insufficient substantiation of claim
Substantive issues:	Right not to be subjected to arbitrary or unlawful interference with his correspondence; right to a fair trial, right to be presumed innocent
Articles of the Covenant:	14, paragraphs 1 and 2, 17
Article of the Optional Protocol:	2

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 25 July 2006,

Adopts the following:

Decision on admissibility

1. The author of the communication, dated 13 January 2006, is José Zaragoza Rovira, a Spanish national, currently serving a former sentence. He claims to be a victim by Spain of violations of articles 14, paragraph 1 and 2, and article 17 of the Covenant. The Optional Protocol came into force for the State party on 25 April 1985. The author is represented by counsel Marco Rodríguez-Farge Ricetti.

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* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Nisuke Ando, Mr. Prafullachandra Natwarlal Bhagwati, Mr. Maurice Glèlè Ahanhanzo, Mr. Edwin Johnson, Mr. Walter Kälin, Mr. Ahmed Tawfik Khalil, Mr. Rajsoomer Lallah, Ms. Elisabeth Palm, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Ivan Shearer and Mr. Hipólito Solari-Yrigoyen.

Factual background

2.1 According to the author, he was convicted and sentenced to 9 years' imprisonment for drug trafficking on the basis of evidence obtained illegally. Agents of Police Customs at Schiphol airport in Amsterdam, opened a parcel containing newspapers impregnated with cocaine, without having been authorized by any judicial authorities, and afterwards contacted police authorities in Spain alerting them that the parcel would arrive in Spain. Upon arrival in Spain, the parcel was opened in the presence of a judge and its content was analyzed, being 1,622 g of cocaine. The judge instructed the police that the parcel be delivered under surveillance, and the author was arrested while the delivery company was delivering the parcel to him.

2.2 According to the judgement of the Provincial Court of Barcelona (*Audiencia Provincial de Barcelona*) of 16 November 2001, prior to March 2000, the author created Ke-Ko-Kol S.L., a fictitious company, with the purpose of covering up his illegal activities. Pretending to be one Jordi Grau, he then contacted a delivery company with which he had made arrangements to receive packages. In March 2000, the Barcelona police received information from customs authorities at the Amsterdam airport, alerting them that a parcel addressed to Ke-Ko-Kol S.L, coming from a person in Ecuador and containing newspapers impregnated with cocaine, was in transit to Barcelona. The police asked the investigating judge (*Juzgado de Instrucción de Barcelona*) to authorize the seizure of the drugs and delivery of the parcel under surveillance to the addressee, which was granted. Upon arrival in Barcelona, the parcel was opened and 18 envelopes were seized, containing newspapers impregnated with cocaine. One envelope was found open. Afterwards, the parcel was sent to the delivery company. The author was arrested while attempting to receive the parcel at the address he had previously arranged with the delivery company.

2.3 The author states that Spanish judicial authorities should have ascertained whether or not the parcel was legally opened in the Netherlands, and that their failure to verify this aspect resulted in the author's conviction being based on illegal evidence, which allegedly made the trial null and void. The author affirms that the parcel was opened in the Netherlands. However, the Provincial Court of Barcelona, in its judgement, noted that there was no evidence that the parcel had in fact been opened; Dutch authorities had not provided any information on whether or not they had opened it. They had limited themselves to stating that the parcel contained between 20 to 25 newspapers impregnated with cocaine, but in fact there were only 18 newspapers. Had they opened the parcel, they would have provided accurate information on the number of papers. The fact that one envelope was open was of no relevance because Spanish authorities only confirmed that the envelope was already found open, not that it had signs of having been opened. Dutch authorities did not request their counterparts to carry out a delivery under surveillance, but limited themselves to informing them about a suspicion that they had for which they had reasonable proof. The information could have been obtained in other ways.

2.4 The author argues that all domestic remedies are exhausted. On 11 June 2003, the Supreme Court (*Tribunal Supremo*) dismissed his appeal (*cassation*) against the judgement of the lower court. On 4 July 2005, the Constitutional Court (*Tribunal Constitucional*) rejected his appeal (*amparo*) as inadmissible, since he had merely reproduced the allegations he had made in lower courts, which had been duly addressed by the latter, instead of challenging the Supreme Court's *ratio decidendi* when it dismissed his appeal (*cassation*).

The complaint

3.1 The author alleges a violation of article 17 of the Covenant, because he was convicted on account of evidence obtained illegally. According to him, that Dutch authorities had informed their Spanish counterparts that the parcel contained newspapers impregnated with cocaine, and that one of the envelopes was found open proves that the parcel was indeed opened by Dutch custom officers. This circumstance, had it been properly interpreted, should have led the Spanish courts to conclude that a presumption in favour of the author applied, i.e., that the parcel had been illegally opened in the Netherlands. The author acknowledges that the parcel was opened in Spain in accordance with Spanish law, with prior judicial authorization. However, he claims that Spanish courts should have verified the above-mentioned alleged irregularity, and accordingly acquitted him. He refers to article 11.1 of the Law on the Judicial Branch (*Ley Orgánica del Poder Judicial*), under which evidence obtained illegally, either directly or indirectly, cannot support a guilty verdict. The author also invokes general comment on article 17 and the Committee's Views on communication No. 453/1991 (*Coeriel and Aurik v. The Netherlands*)[1] to recall the Committee's interpretation of notions such as "arbitrariness" and "reasonableness". He claims that article 17 has been violated because his private correspondence was arbitrarily and unreasonably interfered with by Spanish courts.

3.2 The author claims to be a victim of a violation of article 14, paragraph 1, because Spanish courts disregarded his motion to declare void and null the evidence obtained illegally. He alleges that the Constitutional Court specifically contributed to this violation by dismissing his appeal (*amparo*) on simple admissibility grounds and declining to examine its merits. He also alleges a violation of article 14, paragraph 2, because Spanish courts should have declared null and void the evidence against him.

Issues and proceedings before the Committee

Consideration of admissibility

4.1 Before considering any claims contained in a communication, the Human Rights Committee must, in accordance with rule 93 of its rules of procedure, decide whether or not it is admissible under the Optional Protocol to the Covenant.

4.2 The Committee has noted the author's allegation that the parcel was opened by Dutch authorities, a claim that is contradicted by the findings of Spanish courts. The Committee considers that the issue of whether or not the parcel might have been opened in the Netherlands, with or without judicial authorization, clearly relates to issues of evaluation of facts; it recalls its jurisprudence that it is generally for the courts of States parties to the Covenant to evaluate facts and evidence in a particular case, unless it can be ascertained that the evaluation was clearly arbitrary or amounted to a denial of justice.[2] The material before the Committee does not show that the proceedings in the State party suffered from any such defects. Thus, the Committee considers that the author has failed sufficiently to substantiate his claims, for purposes of admissibility, and it concludes that the communication is inadmissible under article 2 of the Optional Protocol.

5. The Human Rights Committee therefore decides:

(a) That the communication is inadmissible under article 2 of the Optional Protocol;

(b) That this decision shall be transmitted to the State party and to the author, for information.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the Committee's annual report to the General Assembly.]

Notes

[1] Adopted 8 July 1993, para. 10.4.

[2] See for example communication Nos. 1188/2003, *Riedl-Riedenstein v. Germany*, para. 7.3; No. 886/1999, *Bondarenko v. Belarus*, para. 9.3; No. 1138/2002, *Arenz et al. v. Germany*, admissibility decision, para. 8.6; No. 541/1993, *Errol Simms v. Jamaica*, Inadmissibility decision adopted on 3 April 1995, para. 6.2.

Annex VII

FOLLOW-UP OF THE HUMAN RIGHTS COMMITTEE ON INDIVIDUAL COMMUNICATIONS UNDER THE OPTIONAL PROTOCOL TO THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS

This report sets out all information provided by States parties and authors or their counsel since the last Annual Report (A/60/40).

State party	**ANGOLA**
Case	Carlos Diaz, 711/1996
Views adopted on	20 March 2000
Issues and violations found	No serious investigation of crimes committed by person in high position, harassment of the author and witnesses so that they cannot return to Angola, loss of property - Article 9, paragraph 1.
Remedy recommended	An effective remedy and to take adequate measures to protect his personal security from threats of any kind.
Due date for State party response	17 July 2000
Date of State party's response	12 January 2006
State party response	The Committee will recall that the State party provided no information to the Committee prior to consideration of this case. The State party submits that the Optional Protocol came into force on 10 April 1992 rather than 9 February 1992 as stated in the communication. It provides detailed *ratione temporis* arguments on the inadmissibility of the claim relating to the murder of Ms. Carolina de Fátima da Silva Francisco. The Committee will recall that this claim was found to be inadmissible. As to the claim on the basis of which the Committee found a violation of article 9, the State party submits that the author did not exhaust domestic remedies and that therefore this claim should have been considered inadmissible. It submits that it is not clear from the author who is alleged to have threatened him – the government of Angola or the perpetrators of the crime - and if the author, when faced with said threats or fear, requested the protection of the competent government authorities and personal safety pursuant to legal requirements.

According to articles 20 and 22 of the Angolan Constitutional law, the personal and physical integrity of any citizen, including foreigners, is protected by law. The State party has structures in place to provide these services, make police available if it is considered appropriate, or place under police custody individuals who threaten or intimidate others.

As to the prohibition of the author to enter Angola, the State party submits that Mr. Dias like any other foreign citizen may present himself to any Consular representative of Angola, present the documents required by law and apply for an entry visa, which will then be considered within the requirements of the law. The State party requests the Committee to reconsider this case.

Author's response	The State party's response was forwarded on 1 March 2006 to the author for comment but was returned unopened.
Committee's Decision	The Committee recalls that during the eighty-second and eighty-fourth sessions, the Special Rapporteur met with representatives of the State party, who provided the same arguments challenging the Committee's decisions as those above. The Committee regards the State party's response as unsatisfactory and considers the follow-up dialogue ongoing.
Case	Rafael Marques de Morais 1128/2002
Views adopted on	29 March 2005
Issues and violations found	Arbitrary arrest and detention, travel constraints and restricted right to freedom of expression with respect to comments made against the President - Articles 9, paragraphs 1, 2, 3, 4, and articles 12, and 19.
Remedy recommended	In accordance with article 2, paragraph 3, of the Covenant, the author is entitled to an effective remedy, including compensation for his arbitrary arrest and detention, as well as for the violations of his rights under articles 12 and 19 of the Covenant. The State party is under an obligation to take measures to prevent similar violations in the future.
Due date for State party response	1 July 2005
Date of State party's response	20 January 2006

State party response	The State party refers only to the author's argument in paragraph 2.14 of the Views on the issue of the Amnesty Law 7/00, of 15 December 2000. The author had complained that regardless of this amnesty, he was summoned to the Provincial Court and ordered to pay compensation of Nkz. 30,000 to the President, which he refused to pay, and legal costs, for which he paid. The State party argues that the law does not cover civil liability resulting from amnestied crimes and that the author is thus obliged to pay compensation to the President as set out in the Supreme Court Appeal. According to the State party, "the basis of the case presented to the High Commissioner for Human Rights of the United Nations was therefore unfounded". The State party also transcribes the judgement of the Supreme Court in this case and requests the Committee to revise its decision.
Author's response	On 1 May 2006, the author's counsel commented on to the State party's response. They submit that the State party essentially reproduces the decision of the Supreme Court (which was already included in the file considered by the Committee) and then summarily requests the Committee to consider the case inadmissible. In light of the fact that the State party failed to respond to any requests for information from the Committee prior to consideration of this case, such a request at this stage is considered disrespectful. The State party fails to address the Committee's conclusions and should be reminded of its obligations to cooperate with the Committee. They request the Committee to continue to request information from the State party and suggest the following possible remedies: the publication of an apology; quashing of his criminal conviction and legal effects; adequate monetary compensation; the adoption of a series of legislative and administrative measures to bring its law and practices relevant to freedom of expression and due process rights in line with the requirements of international law.
Committee's Decision	The State party has failed to address the violations found or even to acknowledge the Committee's findings. It merely refers to the author's obligation under domestic legislation without acknowledging that the Committee found, inter alia, a violation of article 19 in this case for the restriction of the author's freedom of expression with respect to his criticism of the President.
State party	**AUSTRALIA**
Case	Winata, 930/2000
Views adopted on	26 July 2001

Issues and violations found	Removal from Australia of Indonesian parents of Australia-born child. Articles 17; 23, paragraph 1; 24, paragraph 1.
Remedy recommended	To refrain from removing the authors from Australia before they have had an opportunity to have their applications for parent visas examined, with due consideration given to the protection required by their child's status as a minor.
Due date for State party response	12 November 2001
Date of State party's response	2 September 2004
State party response	The State party advised that the authors remained in Australia and that it was considering how their situation could be resolved within existing Australian immigration laws. A detailed response would be provided to the Committee as soon as possible.
Author's response	On 5 September 2005 counsel informed the Committee that no action had been taken by the State Party to implement the Committee's recommendation. Mr. Winata and Ms. Li have not been deported but rather remain in limbo. They are still stateless and have been told that their application is still "in the queue".
Case	Madafferi, 1011/2001
Views adopted on	28 July 2004
Issues and violations found	Removal from Australia of Italian father of Australia-born children - Articles 10, paragraph, 1, 17, paragraph 1, in conjunction with articles 23 and 24, paragraph 1 of the Covenant
Remedy recommended	In accordance with article 2, paragraph 3 (a), of the Covenant, the State party is under an obligation to provide the author with an effective and appropriate remedy, including refraining from removing Mr. Madafferi from Australia before he has had the opportunity to have his spouse visa examined with due consideration given to the protection required by the children's status as minors. The State party is under an obligation to avoid similar violations in the future.
Due date for State party response	26 October 2004
Date of State party's response	June 2006

State party response

As to the violation of article 10, paragraph 1, for the relocation of Mr. Madafferi to an immigration detention centre at risk to his mental health in June 2003, the State party advises that immigration detainees are treated with humanity and with respect for their inherent dignity as human persons. The Department of Immigration and Multicultural Affairs ("DIMA") works closely with experienced health professionals to ensure that the health care needs of detainees are appropriately met. Detainees have access to a wide range of health care services, including psychological/psychiatric services. The health care needs of each detainee are identified by qualified medical personnel as soon as possible after a person is placed in detention. The care and welfare of detainees with special needs is a matter of particularly close oversight and management by both departmental and detention service provider staff within immigration detention facilities. Where necessary, detainees are referred to external advice and/or treatment.

In the present case, the author was transferred to an immigration detention centre for the following reasons: his flight risk had increased because he had exhausted his domestic avenues for judicial remedy and was facing the imminent prospect of removal from Australia; he had a previous history of avoiding DIMA whilst living in Australia unlawfully for 6 years; and to facilitate the administrative aspects of his removal from Australia.

The state of Mr. Madafferi's mental health (including as described in medical reports) was carefully weighed against these factors. However, the Australian Government considered that it was the prospect of removal from Australia, rather than the return to an immigration detention centre for a short period, which was having the greatest impact on Mr. Madafferi's mental health at this point in time. Taking all these factors into account, the Australian Government considers that the decision to detain Mr. Madafferi was based on a proper assessment of his circumstances and was proportionate to the ends sought. Mr. Madafferi's detention was in accordance with Australian domestic law and flowed directly from his status as an unlawful non-citizen.

The Australian Government wishes to advise the Committee that Mr. Madafferi was granted a spouse (migrant) permanent visa on 3 November 2005. This allows Mr. Madafferi to remain in Australia on a permanent basis, subject to the conditions of the visa. The decision to grant Mr. Madafferi a visa has been made in accordance with Australian domestic immigration law.

As to the Committee's view that the removal of Mr. Madafferi from Australia would constitute arbitrary interference with the family, contrary to article 17 (1), in conjunction with article 23, and article 24 (1) (in relation to the four minor children), the State party reiterates its submissions to the Committee on the admissibility and merits of Mr. Madafferi's communication with regard to these articles. It submits, inter alia, that article 17 does not confer on a non-citizen the right to live and raise children in a country in which he resides unlawfully. Nor is there a legitimate expectation on the part of a person residing unlawfully in a country of continuing to live in that country. Any removal of Mr. Madafferi would not have interfered with the privacy of the Madafferi family as individuals or their relationships with each other. Nor would Australia's actions with regard to Mr. Madafferi have been unlawful or arbitrary. Any decision to remove Mr. Madafferi from Australia would have been made in accordance with Australian law and would have been solely aimed at ensuring the integrity of Australia's migration system.

The State party's obligation to protect the family under article 23 of the Covenant does not mean that Australia is unable to remove an unlawful non-citizen just because that person has established a family with Australian nationals. Had Mr. Madafferi been removed from Australia, it would have resulted from his conduct in twice over-staying his Australian entry permit, his dishonesty when dealing with Australian immigration officials and his substantial criminal record.

Finally, the State party does not accept that Mr. Madafferi's removal would have amounted to a violation of article 24 as it would not have amounted to a failure to provide protection measures that are required by the Madafferi children's status as minors. Any long term separation of Mr. Madafferi from the Madafferi children would have occurred as a result of decisions made by the Madafferi family and not as a result of Australia's actions.

The State party does not accept the Committee's view that Australia is under an obligation to provide Mr. Madafferi with an effective and appropriate remedy.

Author's response By email on 16 June 2006, the author confirmed that he had been granted a permanent residence visa.

Committee's Decision While regretting the State party's refusal to accept its Views, the Committee regards the provision of a permanent residence visa to the author as a satisfactory remedy to the violations found.

Case	Faure, 1036/2001
Views adopted on	31 October 2005
Issues and violations found	Compatibility of "Work for Dole Programme" with the Covenant – articles 2, paragraphs 3 in conjunction with 8.
Remedy recommended	While in accordance with article 2, paragraph 3 (a), of the Covenant, the State party is under an obligation to provide the author with an effective remedy, the Committee is of the view that in the present case its Views on the merits of the claim constitutes sufficient remedy for the violation found. The State party is under an obligation to ensure that similar violations of the Covenant do not occur in the future.
Due date for State party response	20 February 2006
Date of State party's response	7 February 2006
State party response	Australia welcomes the HRC finding that there was no violation of article 8 (3) of the ICCPR. However, regarding the HRC's view that there was a breach of article 2, the Australian Government does not share the HRC's interpretation of article 2, and it notices that it is the first occasion on which the HRC has found that there can be a breach of article 2 in the absence of a breach of an article that contains a substantive guarantee. Australia refers to the HRC's jurisprudence (*Karen Noelia Llantoy Huamán v. Peru*, 1153/2003) and says that article 2 is an accessory right which lays down general obligations for States and that it cannot be invoked in isolation from other Covenant rights. Australia also recalls general comment No. 29, paragraph 14, and says it interprets the statement in line with its ordinary meaning, so that there must be a breach of a right before article 2 may be invoked to require a State to provide an effective remedy. Australia further adds that academic commentators have agreed with Australia's interpretation of article 2 (3) and quotes Joseph, Schultz and Castan. Australia states that its interpretation of article 2 is also in accordance with the HRC's decisions in *GB v. France* (348/1989) and *SG v. France* (347/1988). It quotes paragraph 3 of the individual opinion of three HRC members in *Kall v. Poland* (552/1993) in which it is affirmed that the HRC "has taken the view so far that [article 2 (3)] cannot be found to have been violated by a State unless a corresponding violation of another right under the Covenant has been determined". Australia further recalls that in paragraph 7.9 of

Andrew Rogerson v. Australia (802/1998) the HRC found that "the provisions of article 2 of the Covenant, which lay down general obligations for States parties, cannot, in isolation, give rise to a claim in a communication under the Optional Protocol".

Moreover, Australia stresses that in *Karen Noelia Llantoy Huamán v. Peru* (1153/2003), whose views were adopted the day before the present views, the HRC found a violation of article 2 only in conjunction with a violation of other substantive articles. Australia finally recalls that in *Dimitrov v. Bulgaria* (1030/2001), considered in the same sitting, the HRC found that, as the claim under article 14 was inadmissible *ratione materiae*, the claim under article 2 was unable to be sustained and was also inadmissible. Australia deems that the conclusion of the HRC in this case - that there has been a breach of article 2 in the absence of a breach of a substantive right which requires a remedy - departs from the HRC's previous jurisprudence.

Applying the jurisprudence of *CF et al v. Canada* (113/1981) to the present case, Australia states it should not be obliged to provide a way of challenging the entire legislative structure for the Work of the Dole scheme as a preventive measure, but if there is a violation, there should be an effective remedy after that violation. Australia affirms that the complainant did have access to many domestic remedies which could provide her with redress. Australia further claims that the complainant could have sought judicial review of the decision of the Human Rights and Equal Opportunity Commission in the Federal Court or Federal Magistrates Court.

Australia then comments on the HRC's Concluding Observations on Australia's third and fourth Reports where the HRC was concerned about the absence of a constitutional 'bill of rights' in Australia. Australia notes that there is no requirement for States parties to adopt the Covenant and other international human rights obligations in their entirety into their domestic law. The Australian Government says it does not support a bill of rights for Australia because the country already has a robust constitutional structure, an extensive framework of legislation protecting human rights and prohibiting discrimination, and an independent human rights institution, the Commission. The latter mechanism holds the legislative branch and Australian Government accountable against human rights standards and thereby substantively achieves the same outcome in this respect as would legislation that directly implements the Covenant. Australia adds that human rights are also protected and promoted by Australia's strong democratic institutions.

For these reasons, the Australian Government cannot accept the HRC's view that Australia has breached article 2.

Author's response	In March 2006, the author commented that although the State party purported to accept the Views of the Committee in one paragraph of its response it specifically refused to accept its Views in a subsequent.
Committee's Decision	The Committee regrets the State party's refusal to accept the Committee's Views and considers the dialogue ongoing.
State party	**AUSTRIA**
Case	Karakurt, 965/2001
Views adopted on	4 April 2002
Issues and violations found	Racial discrimination in field of employment
Remedy recommended	In accordance with article 2, paragraph 3 (a), of the Covenant, the State party is under an obligation to provide the author with an effective remedy, consisting of modifying the applicable law so that no improper differentiation is made between persons in the author's situation and EEA nationals.
Due date for State party response	19 September 2002
Date of State party's response	21 February 2006 (The State party had previously replied on 21 September 2002)
State party response	The Committee will recall that as set out in A/58/40, the State party had previously responded on 21 September 2002 and 6 August 2003. It had informed the Committee, that the Views had been widely published and that it was awaiting the outcome of two cases raising similar issues before the European Court of Human Rights and the European Court of Justice. On 21 February 2006, the State party submitted that the Austrian legal system has been amended in accordance with the Committee's Views. The 1992 Chamber of Labour Act (*Arbeiterkammergesetz*) and the Industrial Relations Act (*Arbeitsverfassungsgesetz*) have been amended by Federal Law, Federal Law Gazette Vol. I, No. 4/2006 to the effect that - irrespective of their nationality - all workers are now entitled to stand for election to a chamber of labour and to a works council in Austria (see also the individual members' bill 607/A BlgNR XXII. GP).
Author's response	None

Case	Weiss, 1086/2002
Views adopted on	3 April 2003
Issues and violations found	Extradition to the United States - Article 14, paragraph 1, read together with article 2, paragraph 3.
Remedy recommended	To make such representations to the United States' authorities as may be required to ensure that the author does not suffer any consequential breaches of his rights under the Covenant, which would flow from the State party's extradition of the author in violation of its obligations under the Covenant and the Optional Protocol. To take appropriate steps to ensure that the Committee's requests for interim measures of protection will be respected.
Due date for State party response	8 August 2003
Date of State party's response	23 January 2006 (the State party had previously replied on 6 August 2003 and 4 August 2004)
State party response	The Committee will recall that, as set out in the interim report of the eighty-fourth session, the State party provided a copy of the Supreme Court judgement of 9 September 2003, which saw "no reasons to doubt the constitutionality, of the application of the extradition treaty between the Austrian and US governments". It has also stated that the litigation in the United States was ongoing. On 23 January 2006, the State party confirmed that the proceedings before the United States' courts were still pending. The author applied for habeas corpus by the court in Florida on the basis of his illegal extradition from Austria. This request was rejected by the court. An appeal is pending. The extradition of the author to the United States was rejected "on one count of indictment". He has, thus, the right to a corresponding reduction of sentence. However, the author is not applying for such a penalty reduction, but instead claims immediate release and re-initialization of the process. The United States Department of Justice as well as the court in Florida have explicitly recognized that, on the basis of the specificity of the extradition, there would have to be a reduction of the sentence but have not yet made a final decision on the author's claim. The State party will continue to supervise the course of the process in the United States.

Case	Perterer, 1015/2001
Views adopted on	20 July 2004
Issues and violations found	Equality before the courts - Article 14, paragraph 1
Remedy recommended	In accordance with article 2, paragraph 3, of the Covenant, the State party is under an obligation to provide the author with an effective remedy, including payment of adequate compensation. The State party is also under an obligation to prevent similar violations in the future.
Due date for State party response	
Date of State party's response	8 March 2006
State party response	The State party submits that the Views were published by the Federal Chancellery in English and in a non-official German version. The author made specific claims in a letter of 1 September 2004 vis-à-vis the Attorney-General's Department and after, his claims were dismissed, he brought a liability action and a "State liability action" against the federal authorities and the State of Salzburg in the Summer of 2005 with the Salzburg Regional Court. The federal authorities and the State of Salzburg submitted comments, rejecting his claims. His request for legal aid was granted at the second instance. Moreover, he also laid "an information" against the Senate of the Administrative Court determining his case, on which as far as the State party is aware no decision has yet been taken. It submits that the Ombudsman's Office, to which the author turned to in the early autumn of 2004, was trying to reach a consensus in the form of a settlement between the State of Salzburg (as the Austrian authority responsible for the violations) and the author thus acting in conformity with the case-law of the European Court of Human Rights. Against the background of the claims raised by the author, the Ombudsman's Office decided to make no further efforts for the time being.
State party	**BELARUS**
Case	Svetik, 927/2000
Views adopted on	8 July 2004

Issues and violations found	The limitation of the liberty of expression did not legitimately serve one of the reasons enumerated in article 19, paragraph 3. Therefore, the author's rights under article 19, paragraph 2, of the Covenant had been violated.
Remedy recommended	Effective remedy, including compensation amounting to a sum not less than the present value of the fine and any legal costs paid by the author.
Due date for State party response	18 November 2004
Date of State party's response	12 July 2005
State party response	As presented in its interim report from the eighty-fourth session, the State party had responded on 12 July 2005. It confirmed that the Supreme Court had studied the Committee's Views, but had not found any grounds to reopen the case. The author had been convicted not for the expression of his political opinions, but for his public call to boycott the local elections. Accordingly, the State party concluded that it cannot agree with the Committee's findings that the author is a victim of violation of article 19, paragraph 2, of the Covenant.
Author's response	On 19 February 2006, the author confirmed the outcome of the Supreme Court consideration of this case. His application did not reveal any new grounds for the annulment of previous court decisions, "notwithstanding the change of law and the examination of his case by the Human Rights Committee". He submits that he also appealed his case to the Constitutional Court (exact date not provided), requesting the annulment of the Supreme Court's judgement. By letter of 2 December 2004, the Constitutional Court informed him that it is not empowered to interfere with the work of ordinary jurisdictions. The author claims that the State party has not published the Committee's Views.
Further action taken	During the eighty-seventh session, on 24 July 2006, follow-up consultations were held with Mr. Lazarev, First Secretary of the Mission of Belarus, Mr. Ando, Special Rapporteur on the Follow-up to individual complaints and the Secretariat. Mr. Ando explained the follow-up procedure and his role as Rapporteur. He highlighted to Mr. Lazarev that the State party had only responded to the Committee's Views in two of the nine cases in which the Committee had found violations of the Covenant (Svetik, 927/2000 and Malakhovsky, 1207/2003). Mr. Lazarev explained that they had responded to the Working Group on Arbitrary

Detention in the case of Bandazhewsky, 1100/2002, in which it informed the working group that the author had been released pursuant to an amnesty. He assured Mr. Ando that he would forward a copy to the secretariat.

On the State party's response to Malakhovsky, in which the State party challenged the Committee's Views, Mr. Lazarev explained that this was a very famous case in Belarus and the issue of religious freedom is a very sensitive one. He stated that strict legislation on religious groups was introduced in the State party following several suicides of members of cults. Thus, the social context as well as the purely legal context should be recognized by the Committee, as well as, the practical implications for the State party of the Committee's Views. In this context, he expressed the need for more guidance from the Committee on the remedies expected with respect to its Views.

The necessity to respond on the other seven cases in which the Committee found violations was impressed upon Mr. Lazarev and in particular the need to provide remedies to the authors of these violations. An effort to provide relief to the authors in these cases would demonstrate a positive attitude towards the Committee's work, as would a reconsideration of the State party's response to the Views in Svetik, 927/2000 and Malakhovsky, 1207/2003. Mr. Lazarev expressed his appreciation of the meeting with the Rapporteur and ensured him that he would relay the Rapportuer's concerns to his capital.

Case	Velichkin, 1022/2002
Views adopted on	20 October 2005
Issues and violations found	Freedom to impart information - article 19, paragraph 2
Remedy recommended	An effective remedy, including compensation amounting to a sum not less than the present value of the fine and any legal costs paid by the author.
Due date for State party response	20 February 2006
Date of State party's response	None
State party response	None

Author's response	On 10 February 2006, the author submits that the State party has not implemented the Committee's decision. He contends that on 9 January 2006, he complained to the Deputy Chairman of the Supreme Court, asking him to "send him the ruling of the Chairman of the Supreme Court annulling the judgem0ent of the Lenin District Court of Brest of 15 January 2001", in light of the Committee's Views. On 13 January 2006, the Supreme Court replied that his application had been examined but that no grounds were found to annul the District Court ruling of 15 January 2001, in which he was obliged to pay a fine.
Case	Bandajevsky, 1100/2002
Views adopted on	28 March 2006
Issues and violations found	Arbitrary arrest, unlawful detention, inhuman conditions of detention, court not established by law, no review - Articles 9 paragraphs 3, 4, 10, paragraph 1, 14, paragraphs 1 and 5.
Remedy recommended	In accordance with article 2, paragraph 3 (a), of the Covenant, the State party is under an obligation to provide Mr. Bandajevsky with an effective remedy, including appropriate compensation. The State party is also under an obligation to prevent similar violations in the future.
Due date for State party response	6 July 2006
Date of State party's response	On 29 August 2005, the State party replied to the Working Group on Arbitrary Detention. This information was not provided to the HRC until 24 July 2006.
State party response	It states that in accordance with the ruling of 5 August 2005 by the court of Diatlov region, Grodno oblast, the author was released early from serving the remaining of sentence of 18 June 2001.
Case	Malakhovsky and Pikul, 1207/2003
Views adopted on	12 August 2003
Issues and violations found	Refusal to register a religious organization - 18, paragraphs 1 and 3
Remedy recommended	Pursuant to article 2, paragraph 3 (a), of the Covenant, the Committee considers that the authors are entitled to an appropriate remedy, including a reconsideration of the authors' application in accordance with the principles, rules and practice in force at the time of the authors' request, and duly taking into account of the provisions of the Covenant.

Due date for State party response	10 November 2005
Date of State party's response	13 January 2006
State party response	The State party disagrees with the Committee's conclusion and reiterates its arguments made on the admissibility and merits of the case. It affirms that the court rejected the author's claims on the refusal of the Committee on Religions and Nationalities to register the Statute of the Krishna communities' association because of the absence of an approved legal address. The requirement to have a legal address for religious organizations and the limitations on the use of buildings for other religious purposes (invoked by the Committee in its Views in paragraphs 7.6 and 8) is set up by Belarusian law. Courts are judicial bodies and adopt decisions in the light of the legislation in force. The decision of the Court of the Central District of Minsk was taken on the basis of the legislation in force and evidence in the case, and is lawful and well-founded. Under article 17 of the Law on freedom of religion and religious organizations, statutes of religious organizations must provide information on their location. In addition, under article 50 (3) of the Civil Code of Belarus the names and location of legal persons, including religious organizations, must be reflected in their statutory documents. The use of habitation premises for non-residential purposes is made with the agreement of the local executive and administrative organs, in accordance with the rules of sanitary hygiene and fire safety (article 8, paragraph 4, Habitation Code of Belarus). The statutory documents, submitted for the registration of the association, referred to a house at No. 11 on Pavlov street in Minsk. This building was examined and infringements of the sanitary and fire safety regulations were established. This was confirmed by the documents presented to the court by the Sanitary-epidemiological service and the Emergency situations' service of the Central district of Minsk. It is for this reason, that this house's address could not be used as the legal address for the association. According to the State party, in these circumstances, the court had correctly concluded that the refusal to register the religious association was lawful.
Author's response	None

Committee's Decision	The Committee notes that the State party's response on its Views is a reiteration of information provided prior to consideration. The State party submits that the courts' decisions were in compliance with domestic law but does not respond on the Committee's findings that the law itself has been found to be contrary to the rights protected under the Covenant. The Committee observes that the State party does not respond to its concerns.
State party	**BURKINO FASO**
Case	1159/2003
Views adopted on	28 March 2006
Issues and violations found	Inhuman treatment and equality before the Courts - Articles 7 and 14, paragraph 1.
Remedy recommended	The State party is required to provide Ms. Sankara and her sons an effective and enforceable remedy in the form, inter alia, of official recognition of the place where Thomas Sankara is buried, and compensation for the anguish suffered by the family. The State party is also required to prevent such violations from occurring in the future.
Due date for State party response	4 July 2006
Date of State party's response	30 June 2006
State party response	The State party states that it is ready to officially acknowledge Mr. Sankara's grave at Dagnoin, 29 Ouagadougou, to his family and reiterates its submission prior to the decision that he has been declared a national hero and that a monument is being erected in his honour. It submits that on 7 March 2006, the Tribunal of Baskuy in the commune of Ouagadougou ordered a death certificate of Mr. Sankara, deceased on 15 October 1987 (it does not mention the cause of death). Mr. Sankara's military pension has been liquidated for the benefit of his family. Despite offers by the State to the Sankara family to compensation from a fund set up on 30 March 2001 by the government for victims of violence in political life, Mr. Sankara's widow and children have never wished to receive compensation in this regard. On 29 June 2006, and pursuant to the Committees' Views to provide compensation, the government has assessed and liquidated the amount of compensation

due to Ms. Sankara and her children as 43 4450 000 CFA (around US$ 843,326.951). The family should contact the fund to ascertain the method of payment.

The State party submits that the Views are accessible on various governmental websites, as well as distributed to the media.

Finally, the State party submits that the events which are the subject matter of these Views occurred 15 years ago at a time of chronic political instability. That since that time the State party has made much progress with respect to the protection of human rights, highlighted, inter alia, in its Constitution, by the establishment of a Minister charged with the protection of human rights and a large number of NGOs.

State party	**CANADA**
Case	Judge, 829/1998
Views adopted on	5 August 2002
Issues and violations found	Bearing in mind that the State party has abolished capital punishment, the decision to deport the author to a state where he is under sentence of death without affording him the opportunity to avail himself of an available appeal, was taken arbitrarily and in violation of article 6, paragraph 1, alone and read together with article 2, paragraph 3.
Remedy recommended	An appropriate remedy which would include making such representations as is possible to the receiving state to prevent the carrying out of the death penalty on the author.
Due date for State party response	12 November 2003
Date of State party's response	9 May 2006 (Previously responded on 8 August 2004 and 17 November 2003)
State party response	On 9 May 2006, and following the Special Rapporteur's request to the State party to provide an update from the United States authorities on the author's situation, the State party reiterated its response outlined in the Follow-up Report (CCPR/C/80/FU1) and the Annual Report (CCPR/C/81/CRP.1/Add.6). It added that on 18 January 2006, it had sent a diplomatic note to the United States reiterating its previous note and requesting an update on the status of Mr. Judge. The United States acknowledged receipt of the note and forwarded it to the Governor of Pennsylvania, for his consideration. To date the Government has not received a reply but to the best of its knowledge no date has been set for his execution. The State party requests that this case be removed from consideration under the follow-up procedure.

Author's response	In a letter received on 12 October 2005 the author had informed the Committee that no measures have been taken by Canada to implement the Committee's recommendation.
Case	Ominayak, 167/1984
Views adopted on	26 March 1990
Issues and violations found	Minority rights - Article 27
Remedy recommended	Historical inequities, to which the State party refers, and certain more recent developments threaten the way of life and culture of the Lubicon Lake Band, and constitute a violation of article 27 so long as they continue. The State party proposes to rectify the situation by a remedy that the Committee deems appropriate within the meaning of article 2 of the Covenant.
Due date for State party response	No record of date
Date of State party's response	25 November 1995
State party response	The Committee will recall that in a follow-up response of 25 November in 1995, the State party stated that the remedy was to consist of a comprehensive package of benefits and programmes valued at $45 million and a 95 square mile reserve. At the time, negotiations were still ongoing as to whether the Band should receive additional compensation.
Author's response	Many petitions have been received in the months of January and February 2006, from various individuals in France (relationship to authors unknown), requesting the Committee to follow-up on this case and claiming that the current situation of the Lubicon Lake Band is "intolerable".
Committee's Decision	Pursuant to the Committee's consideration of the State party's report, during the eighty-fifth session, the Committee adopted the following Concluding Observation with respect to this case: "The Committee is concerned that land claim negotiations between the Government of Canada and the Lubicon Lake Band are currently at an impasse. It is also concerned about information that the land of the Band continues to be compromised by logging and large-scale oil and gas extraction, and regrets that the State party has not provided information on this specific issue." (arts. 1 and 27).

The Committee considered that "The State party should make every effort to resume negotiations with the Lubicon Lake Band, with a view to finding a solution which respects the rights of the Band under the Covenant, as already found by the Committee. It should consult with the Band before granting licences for economic exploitation of the disputed land, and ensure that in no case such exploitation jeopardizes the rights recognized under the Covenant." (CCPR/C/CAN/CO75).

Case	Waldman, 694/1996
Views adopted on	3 November 1999
Issues and violations found	Discrimination of funding in religious schools - Article 26.
Remedy recommended	Under article 2, paragraph 3 (a), of the Covenant, the State party is under the obligation to provide an effective remedy that will eliminate this discrimination.
Due date for State party response	5 February 2000
Date of State party's response	State party had responded on 3 February 2000 (see follow-up information in A/55/40, A/56/40, A/57/40, A/59/40)
State party response	In its note of 3 February 2000, the State party informs the Committee that matters of education fall under the exclusive jurisdiction of the provinces. The Government of Ontario has communicated that it has no plans to extend funding to private religious schools or to the parents of children that attend such schools, and that it intends to adhere fully to its constitutional obligation to fund Roman Catholic schools.
Committee's Decision	Pursuant to the Committee's consideration of the State party's report, during the eighty-fifth session, the Committee adopted the following Concluding Observation with respect to this case, "The Committee expresses concern about the State party's responses relating to the Committee's Views in the case of *Waldman v. Canada*, (communication No. 694/1996), Views adopted on 3 November 1999), requesting that and effective remedy by granted to the author eliminating discrimination on the basis of religion in the distribution of subsidies to schools (arts. 2, 18 and 26)." The Committee considered that, "The State party should adopt steps in order to eliminate discrimination on the basis of religion in the funding of schools in Ontario." (CCPR/C/CAN/CO75).

Case	Mansour Ahani, 1051/2002
Views adopted on	23 March 2004
Issues and violations found	Removal to a country where the author risks torture and/or execution - Articles 7, 9, paragraph 4, 13.
Remedy recommended	In accordance with article 2, paragraph 3 (a), of the Covenant, the State party is under an obligation to provide the author with an effective remedy, including compensation. In the light of the circumstances of the case, the State party, having failed to determine appropriately whether a substantial risk of torture existed such as to foreclose the author's deportation, is under an obligation (a) to make reparation to the author if it comes to light that torture was in fact suffered subsequent to deportation, and (b) to take such steps as may be appropriate to ensure that the author is not, in the future, subjected to torture as a result of the events of his presence in, and removal from, the State party. The State party is also under an obligation to avoid similar violations in the future, including by taking appropriate steps to ensure that the Committee's requests for interim measures of protection will be respected.
Due date for State party response	3 November 2004
Date of State party's response	7 February 2006 (the State party had previously responded on 3 September 2004)
State party response	The Committee will recall, as set out in its 84th interim report, that the State party had contested the Committee's Views and submitted that it had not violated any of its obligations under the Covenant and neither interim measures requests nor the Committee's Views are binding on the State party. It provided detailed arguments disputing the Committee's findings. It disagreed that it should make any reparation to the author or that it has any obligations to take further steps in this case. Nevertheless, in October 2002, Canada indicated to Iran that it expects it to comply with its international human rights obligations, including with respect to the author. In addition, it stated that in order to simplify the process with respect to whether a person who is a danger to the security of Canada may be removed from Canada, the Canadian government now affords all such persons the same enhanced procedural guarantees. In particular, all documents used to form the danger opinion are now provided to the person redacted for security concerns and they are entitled to make submissions.

On 7 February 2006, in response to the Secretariat for updated information on Mr. Ahani, the State party reiterated inter alia that the Canadian Embassy in Tehran visited Mr. Ahani in October 2002, and he did not complain of ill-treatment. That is October 2003, a Canadian representative spoke with his mother who said that he was well and since then the State party has had no further contact with him. The State party notes that Iran is a party to the ICCPR and as such it is bound to respect the rights set out in the Covenant. Canada considers that Iran would be in a better position to respond to any further requests from the Committee on the author status. In addition, there are special procedures, such as the Special Rapporteur on torture, that may be of assistance to Mr. Ahani if need be.

On the basis of the foregoing, the State party requests that this case be removed from the agenda of the Committee's Follow-up procedure.

Committee's Decision	The Committee does not currently intend to consider this matter any further under the follow-up procedure, but will examine it at a later stage if the situation changes.
State party	**COLOMBIA**
Case	Jiménez Vaca, 859/1999
Views adopted on	25 March 2002
Issues and violations found	Security of person not deprived of their liberty - articles 6, paragraph 1, 9, paragraph 1, 12, paragraphs 1 and 4
Remedy recommended	An effective remedy, including compensation; take appropriate measures to protect the author's security so as to allow him to return to the country; carry out an independent inquiry into the attempt on the author's life and expedite the criminal proceedings against those responsible for it.
State party response	Follow-up consultations were held during the seventy-ninth session. See CCPR/C/80/FU1.
Author's response	By letter dated 26 September 2005 the author reiterates the information he had already provided on 4 March 2004, i.e. that, following the adoption of the Committee's Views, he filed a petition first to the Superior Court of the Judicial District of Bogotá and then to the Supreme Court alleging the lack of implementation of the Views. Both remedies were rejected. The Superior Court stated that: (i) the Committee's Views lacks legally binding character; (ii) the Committee of Ministers issued a non-favourable opinion on the issue of implementation; and iii) Colombia's government petitioned the Committee to reconsider its decision.

The author adds that he also filed an appeal with the Constitutional Court which was rejected on 12 April 2005. According to the Court, there was no evidence that the author was currently at risk of being a victim of violations of his rights to life and physical integrity, should he return to Colombia. There was no evidence either that the author had been prevented from using the appropriate domestic remedies in order to pursue those responsible for the facts alleged and obtain reparation. At the same time, the Court requested the Ministry for Foreign Affairs to inform the author about the mechanisms available in order to protect his life, should he receive threats in the future, and that the authorities would take the necessary measures in order to facilitate his return to the country.

The author asks the Committee to intervene with the State Party in order to obtain reparation for the violations found in the Committee's Views and guarantees that would allow him to return safely to his country.

State party	**CROATIA**
Case	Paraga, 727/1996
Views adopted on	4 April 2001
Issues and violations found	"Continuing effects"; pretrial delay and freedom of expression – Article 14, paragraph 3 (c)
Remedy recommended	Compensation
Due date for State party response	27 August 2001
Date of State party's response	26 January 2006 (State party had responded on 29 October 2002 and 2 December 2004)
State party response	The Committee will recall, as set out in its report from the eighty-fourth session, that on 2 December 2004, the State party had informed the Committee that the author's application, of 14 January 2003, for damages sustained during the time spent in custody from 22 November to 18 December 1991 had been rejected as untimely. The author had lodged an appeal to this decision and the case is currently before the County Court of Zagreb. On 26 January 2006, the State party reiterated that the case has still not been considered.

Author's response

On 30 January 2005, the author had confirmed that he had been refused compensation by the Municipal Court of Zagreb, and was in fact ordered to pay the State's legal costs. He has appealed this decision to the County Court of Zagreb, but nearly two years later the case has still not been heard.

State party

THE CZECH REPUBLIC - GENERAL INFORMATION ON PROPERTY CASES

Case

Property cases - Simunek et al. (516/1992), Adam (586/1994), Blazek (857/1999), Des Fours Walderode (747/1997), Brok (774/1997), Fabryova (765/1997), Pezoldova (757/1997), Czernin (823/1998), Marik (945/2000), Patera (946/2000)

Further action taken

On 18 October 2005, the special rapporteur on follow-up to communications, Mr. N. Ando, met with the Ambassador of The Czech Republic and Mr. Lukas Machon, from the Permanent Mission, regarding follow up to the Committee's Views on Czech cases.

The Ambassador informed Mr. Ando that some governmental offices were willing to implement at least some of the recommendations regarding the property cases on an ad hoc basis. The Mission had requested the governmental commission in charge of dealing with individual cases submitted to international bodies, to provide the Committee with written information regarding developments in this respect. The Ambassador also indicated that, regarding some of the cases, no further legal remedies exist. In order for the alleged victims to be able to file new claims the restitution legislation should be modified in Parliament.

The Ambassador provided the following information on each case:

(1) Simunek et al. (516/1992): The authorities consider that the husband of Ms. Simunek could have recovered the couple's property in CZ, as he was a resident in the CZ Republic at the material time. It was the Ambassador's understanding that Ms. Simunek had benefited from proceedings and asked the Secretariat to provide the Mission with copy of the last letter sent to the Committee by Ms. Simunek.

(2) Adam (586/1994): Government has not implemented the Views and recommendations of the Committee in any way. The State representatives said that domestic remedies have not been exhausted. Ex gratia compensation in this case is an avenue recommended to the Government.

(3) Blazek (857/1999): follow-up reply to be submitted hopefully by the end of October. This is also a case in which an ex gratia payment is recommended to the Government.

(4) Des Fours Walderode (747/1997): The Constitutional Court quashed the decision of the land authority (date not specified). Next decision of land authority once again negative. A procedure against renewed refusal of the land authority is still pending in the District Court. Author's wife has case pending in the European Court of HR. A Decision against the State party (probable violation of article 6 ECHR) is expected soon.

(5) Brok (774/1997): Compensation of the family was offered through a Government programme implemented for Holocaust victims. The author's family has accepted the compensation offered.

(6) Fabryova (765/1997): As in the case of Brok, except that the family of Ms. Fabryova has not been satisfied with the compensation offered under the compensation for Holocaust victims scheme. A new claim for restitution was filed.

(7) Pezoldova (757/1997): By letter of 25 July 2005, the State party notified the Committee that the Government had been advised that an ex gratia payment should be made to the author, representing, roughly, the recovery of costs of legal representation (FS 15 - 18000).

(8) Czernin (823/1998): Follow-up submission expected to be provided to the Committee by the end of October. Payment of an ex gratia compensation to the author is being considered, primarily because of the issue of delay in the adjudication of the author's request.

(9) Marik (945/2000): Follow-up reply not yet received. According to information received, Government will be requested to consider an ex gratia payment to the author.

In addition to the above property cases, follow-up information is also required with respect to case 946/2000 (Patera), regarding denial of contact between the author and his son. The Ambassador reported that proceedings are still on going. The author has filed a case before the European Court. His ex-wife won a case at the European Court on the issue of delay in the proceedings.

State party **DEMOCRATIC REPUBLIC OF THE CONGO - GENERAL INFORMATION ON ALL VIEWS**

Cases Mbenge (16/1977), Mpandanjila et al. (38/1983), Luyeye (90/1981), Mutebal (124/1982), Mpaka Nsusul (157/1983), Miango (94/1985), Birindwa (241/1987), Tshisekedi (242/1987), Kanana (366/1989), Tshishimbi (542/1993), Gedumbe (641/1995), Adrien Mundyo Bisyo et al. (933/2000), Marcel Mulezi (962/2001).

State party's response The State party has not responded to any of the Views of the Committee to date.

Committee's Decision During its eighty-sixth session in March-April 2006, the Committee considered the State party's third periodic report. In its Concluding Observations it considered that, "While welcoming the delegation's assertion that the judges who wrote communication No. 933/2000 (*Busyo et al.*) can once again practice their profession freely and have been compensated for being arbitrarily suspended, the Committee remains concerned that the State party failed to follow up on its recommendations contained in many Views adopted under the Optional Protocol to the Covenant (such as the Views in case Nos. 366/1989 (*Kanana*), 542/1993 (*N'Goya*), 641/1995 (*Gedumbe*) and 962/2001 (*Mulezi*).

The State party should follow up on the Committee's recommendations in the above-mentioned cases and submit a report thereon to the Committee as soon as possible. The State party should also accept a mission by the Committee's special rapporteur to follow up to the Views and discuss possible ways and means of implementing the Committee's recommendations, with a view to ensuring more effective cooperation with the Committee."

State party **DENMARK**

Case Byahuranga, 1222/2003

Views adopted on 1 November 2004

Issues and violations found Deportation, torture, right to family life - Article 7

Remedy recommended In accordance with article 2, paragraph 3 (a), of the Covenant, the State party is under an obligation to provide the author with an effective remedy, including revocation and full re-examination of the expulsion order against him. The State party is also under an obligation to prevent similar violations in the future.

Due date for State party response	8 March 2005
Date of State party's response	24 March 2006
State party response	The State party attached the Danish Refugee Board Decision of 10 November 2005 in which it was decided that although the author may be deported from Denmark, he cannot be forcibly returned to Uganda or deported to another country in which he is not protected against being set back to Uganda, pursuant to section 31 of the Aliens Act.
Committee's Decision	The Committee regards the State party's response as satisfactory and does not intend to consider this case any further under the follow-up procedure.
State party	**EQUATORIAL GUINEA - GENERAL INFORMATION**
Case	Primo Essono, 414/1990, Oló Bahamonde, 468/1991
Further action taken	On 24 March 2006, consultations were held with the Permanent Representative of Equatorial Guinea; Ekua Avomo, Counsellor Toribio, Professor Ando, and the secretariat. The meeting was called to discuss follow-up to the Committee's Views on communication Nos. 414 (Primo Essono), 484 (Bahamonde) and 1151 and 1152 (Ndong et al.). The State party representatives were not aware of the Committee's functions (which they seemed to mix up with those of the Commission), not of the above communications. The Ambassador argued that for the more recent cases, the Permanent Mission in Geneva was competent, not New York. He also claimed that the New York mission never received either the file or the Views on case Nos. 1151 and 1152. On case No. 414, the Mission argued that the author had elected residence in Spain in the early 1990's that he had lived there for over 10 years before passing away. For case No. 484, it argued that Mr. Bahamonde has been a member of the Government in the 1980s, before leaving the country and requesting (and being granted) asylum in Europe (Spain). Even while in exile, he had carried out official missions for the government.

Professor Ando regretted the absence of any follow-up submissions on the above case, and reminder the State party of the need to make submissions while cases were pending, as well as in the follow-up context. Even the cursory information on case Nos. 414 and 484 that had just been given by the delegation would be useful in written form. The Ambassador was reminded that follow-up submissions should be sent to the Committee by the end of June, so that the follow-up replies could be included in the annual report of the Committee for 2006.

The Ambassador indicated that he would study the Views in the above cases and solicit a reply from the capital. In the meantime, he solicited a re-transmittal of the case file and the Views (including the transmittal note verbale) in case Nos. 1151 and 1152.

Professor Ando indicated that he would report to the plenary on the meeting - the Ambassador replied that his comments should not be construed as indicating that Equatorial Guinea accepted the Views of the Committee in the above cases as correct, or that the Government agreed with the result.

State party	**GEORGIA**
Case	Ratiani, 975/2001
Views adopted on	21 July 2005
Issues and violations found	No right of appeal - Article 14, paragraph 5
Remedy recommended	Pursuant to article 2, paragraph 3 (a), of the Covenant, the author is entitled to an appropriate remedy. The State party is under an obligation to grant the author appropriate compensation, and to take effective measures to ensure that similar violations do not reoccur in the future.
Due date for State party response	27 October 2005
Date of State party's response	16 January 2005
State party response	The State party informs the Committee that it is taking active steps to amend its legislation to prevent future violations of the Covenant with respect to the right violated. In the meantime, it requested information on cases in which other States parties had amended legislation pursuant to the Committee's decisions.

Author's response	The author informs the Committee that the State party has failed to grant him a remedy and that in a letter to him dated 2 March 2006 the Consultant of the office of the Chairman of the Supreme Court stated that there is no legal ground for his rehabilitation according to the Criminal Procedure Code of Georgia for his criminal prosecution.
State party	**GREECE**
Case	Alexandros Kouidis, 1070/2002
Views adopted on	28 March 2006
Issues and violations found	Evidence given under duress - Article 14, paragraph 3 (g).
Remedy recommended	The State party is under an obligation to provide the author with an effective and appropriate remedy, including the investigation of his claims of ill-treatment, and compensation.
Due date for State party response	4 July 2006
Date of State party's response	3 July 2006
State party response	The State party submits that it has been translated and will be disseminated to the competent judicial authorities and posted on the website of the Legal Council of State. As to the remedy the State party refers to the possibility of recourse in article 105 of the Introductory Law to the Civil Code, to which the author is entitled in order to seek compensation to any damage incurred.
State party	**JAMAICA**
Case	Howell, 798/1998
Views adopted on	21 October 2003
Issues and violations found	Death row phenomenon, beatings after escape, inhuman treatment – articles 7 and 10, paragraph 1
Remedy recommended	In accordance with article 2, paragraph 3 (a), of the Covenant, the State party is under an obligation to provide the author with an effective remedy, including compensation. The State party is also under an obligation to prevent similar violations in the future.
Due date for State party response	4 February 2004

Date of State party's response 21 November 2005

State party response The Committee will recall that the State party did not respond on admissibility and merits of this communication prior to consideration. It submits that, as to article 7, the Superintendent's Diary of the prison noted that on 5 March 1997 at about 5:10 am, five inmates, including Mr. Howell, were caught by the authorities cutting the bars in their cells in a bid to escape. The bid was foiled by the Correctional Officers on duty. An injury report dated 5 March 1997, indicated that the author was subdued while trying to escape and that he suffered injuries to his chin, left arm and back. As a result of a thorough and impartial investigation, the State party is satisfied that reasonable force was used to subdue the author on that day. The State points out that officials involved in the prison system are provided with appropriate training concerning the standards of humane treatment of such persons, including the use of force. This training is periodically reviewed and covers United Nations treaties, and resolutions as well as Jamaican legislation.

As to article 10, paragraph 1, the State party submits that information extracted from the institution's hospital escort book reveals that for the period under review, the author attended the following external facilities for treatment: Spanish Town Dental Surgery (29 September 1997), Spanish Town Hospital (4 October 1997), Dental Office, Burke Road, Spanish Town (5 November 1997). Thus, as far as the State is concerned, the author received adequate dental and medical care.

As to the conditions of detention, it submits that there continue to be several mechanisms in place for investigating and monitoring such conditions. These mechanisms, which are periodically reviewed, are both internal and external. Internally, investigations are first of all carried out by the Superintendent of the Correctional Centre where the inmate is housed, then by the Department of Correctional Services' Inspectorate Unit. Externally, there are various avenues. The Inspectorate Unit has the responsibility of inspecting cells, the interior and exterior of the buildings, staff restrooms, trade areas and all other facilities, records and equipment at every correctional institution. The Unit continues to monitor conformity to the requisite standards of order, cleanliness, adequacy of space, bedding, lighting, ventilation along with the impact of morale and programmes. As necessary, the Inspectorate also makes recommendations for improvements. The Corrections Act also provides for Boards of Visiting Justices and Boards of Visitors to visit the various Correctional Centres, interview inmates, observe conditions and to make recommendations to the Commissioner of Corrections and/or the responsible Minister for corrective actions to be taken.

	The State party maintains its position that the authors' rights were not violated and its view that he could have sought redress through the Jamaican courts. If he could not have afforded legal representation he could have applied for legal aid.
Author's response	None
Committee's Decision	The Committee notes that the State party's response is essentially its comments on admissibility and merits which should have been provided prior to consideration of the Views. It notes that the State party was reminded to provide its submission on two occasions. As is the jurisprudence of the Committee, in the event that a State party fails to provide any observations on the matter before it, due weight must be given to the author's allegations, to the extent that they have been substantiated. The Committee regards the State party's response as unsatisfactory and considers the follow-up dialogue ongoing.
State party	**KOREA**
Case	Mr. Jeong-Eun Lee, 1119/2002
Views adopted on	20 July 2005
Issues and violations found	Criminal prosecution for having joined student council – article 22, paragraph 1.
Remedy recommended	An effective remedy, including appropriate compensation. The Committee recommends that the State party amend article 7 of the National Security Law, with a view to making it compatible with the Covenant. The State party is under an obligation to ensure that similar violations do not occur in the future.
Due date for State party response	10 November 2005
Date of State party's response	29 November 2005
State party response	The State party submits that the author's "civil and political rights", which were temporarily suspended pursuant to his conviction, have been restored. In addition, the Committee's Views were published in "the official gazette" and were then forwarded to national judicial institutions for information. As to the revision of the National Security Law, several bills to revise or annul the law have been presented before the National Assembly and are currently under consideration.

The Government regrets the Committee's decision to consider this case despite the State party's reservation to article 22. The Committee members will recall its finding on this issue in the Views as follows: "As regards the alleged violation of article 22 of the Covenant, the Committee notes that the State party has referred to the fact that relevant provisions of the National Security Law are in conformity with its Constitution. However, it has not invoked its reservation *ratione materiae* to Article 22 that this guarantee only applies subject "to the provisions of the local laws including the Constitution of the Republic of Korea." Thus, the Committee does not need to examine the compatibility of this reservation with the object and purpose of the Covenant and can consider whether or not article 22 has been violated in this case."

State party	**LIBYAN ARAB JAMAHIRIYA**
Case	El Ghar, 1107/2002
Views adopted on	29 March 2004
Issues and violations found	Refusal by the State party to issue the author with a passport - Article 12, paragraph 2.
Remedy recommended	The State party is under an obligation to ensure that the author has an effective remedy, including compensation. The Committee urges the State party to issue the author with a passport without further delay.
Due date for State party response	4 February 2005
State party response	None
Author's response	The Committee will recall, as set out in the 84th report, that by letter dated 23 June 2005, the author referred to the State party's failure to implement the Committee's Views. On 21 February 2006, the author informed the Committee that after many meetings with the Libyan consulate in Morocco, in which she was accused, inter alia, of having committed treason against the State party by bringing her case before the Committee, it still does not appear likely that she will receive her passport. The author informed the Secretariat in October 2005 that the Libyan consulate in Casablanca still refused to issue her passport. In June 2006, she informed the Secretariat by phone that she had been promised her passport. On 7 July 2006, she informed the Secretariat that she had received her passport, but that she had not received any compensation.

State party	**NORWAY**
Case	1155/2003, Leirvag
Views adopted on	3 November 2004
Issues and violations found	Failure to allow exemptions from teaching of 'life stance' subject in schools is a violation of article 26 - Parental right to provide education to their children - article 18, paragraph 4.
Remedy recommended	In accordance with article 2, paragraph 3 (a), of the Covenant, the State party is under an obligation to provide the authors with an effective and appropriate remedy that will respect the right of the authors as parents to ensure and as pupils to receive an education that is in conformity with their own convictions. The State party is under an obligation to avoid similar violations in the future.
Due date for State party response	6 February 2005
Date of State party's response	March 2006 during consider of its fifth periodic report (Previously responded on 4 February 2005).
State party response	During the discussion of the fifth periodic report, the State party confirmed that the proposed amendments to the Education Act, set out in the State party response to the Committee of 4 February 2005, had been adopted and entered into force on 17 June 2005. The new exemption rules provide as follows: on the basis of written notification from parents, pupils can be exempted from attending teaching which they, on the basis of their own religion or philosophy of life, consider to constitute the practice of another religion or expression of adherence to another philosophy of life or which they find offensive or objectionable. It is not necessary to provide reasons for giving a notification of exemption. Pupils who are 15 years of age or older may themselves give written notification of exemption. The right to be excused from parts of the teaching applies to all subjects and multi-subject projects. When the school receives a notification of exemption, it must ensure that the pupil in question is actually excused. The school must also provide exempted pupils with individually adapted teaching within the syllabus. Pupils cannot be exempted from the knowledge requirements of the syllabus. If a school refuses a notification of exemption on these grounds, it must handle the case in accordance with the rules on individual decisions, which are contained in the Norwegian Public

Administration Act, and give a right to appeal the decision. A new syllabus for CKREE was adopted and entered into force in August 2005. It implements the changes made in section 2-4 of the Education Act, ensuring that the religions and outlooks on life are dealt with in the same qualitative manner when setting targets for pupils' competence. Christianity has only been given quantitative preference, due t its influence on the historical and cultural background in Norway. Several measures have been introduced to ensure compliance with the new syllabus. A new CKREE textbook for teachers was sent to all schools in August 2005. In addition, to the syllabus, it contains guidance on how to teach the subject.

In its "policy platform" the State party states that it will reconsider the objects clause (section 1-2 of the Education Act).

Authors' comments

On 15 April 2005, the authors state that the State party's submission of February 2005 does not contain enough substance to determine how the mentioned changes in regulations and curricula will be carried out. They refer to a more detailed version of the remedies proposed in the "hearing document" of the Ministry of Education and Research of 8 February 2005, which has been sent to many organizations and institutions for comment by 29 March 2005. It states that a translated version of this document should be requested of the State party. The government's consideration of comments received has not yet been made public and a recommendation for Parliament concerning amendments of the Education Act has not yet been presented. Although the measures submitted by the State party have not been clarified, the author's preliminary view is that the proposed amendments do not fulfil the obligations under article 2 of the Covenant. They state, inter alia, that: the amendment to section 2-4 will not in itself solve the problem of an object clause which gives the prerogative to one particular religion; there will be no "qualitatively equal" treatment as the CKREE subject is based on the storytelling tradition, which is only appropriate for teaching Christianity and other religions but not for life stances with for instance a humanist outlook; and that the government does not intend to change the character/general profile of the CKREE subject as practising belief. As to the exemption, the authors note that the State party accept that such a right is necessary in order to avoid further violations of the Covenant but that the proposed simplification procedure does not entail substantial changes to parents' rights since the school has the prerogative to determine whether or not the parent's conviction on this issue is "reasonable". In the authors' view the best way to have implemented the Committee's decision would have been to fully revise the CKREE subject in a way that considers the freedom of religion for all students - regardless of faith or personal conviction as to life stance.

Committee's Decision	During the consideration of the fifth periodic report of the State party at the eighty-sixth session (March/April 2006), the Committee stated the following: "4. The Committee commends the prompt response and the measures taken by the State party to remedy the infringements on religious freedom identified in the Committee's Views in communication No. 1155/2003, including the adoption of amendments to the Education Act." (CCPR/C/NOR/CO/5). The Committee considers the State party's response satisfactory and does not intend to consider this case any further under the follow-up procedure.
State party	**PERU**
Case	Vargas Mas, 1058/2002
Views adopted on	26 October 2005
Issues and violations found	Arbitrary detention, torture and inhuman and degrading treatment, faceless judges - Articles 7, 9, paragraph 1, 10, paragraph 1, and 14 of the Covenant.
Remedy recommended	In accordance with article 2, paragraph 3 (a), of the Covenant, the State party is under an obligation to provide the author with an effective remedy and appropriate compensation. In the light of the long period he has already spent in detention, the State party should give serious consideration to terminating his deprivations of liberty, pending the outcome of the current proceedings. Such proceedings must comply with all the guarantees required by the Covenant.
Due date for State party response	6 February 2006
Date of State party's response	25 May 2006
State party response	The State party informs the Committee that a new trial is under way (in accordance with its obligation to provide an effective remedy). It notes, however, that it is for the Judiciary to determine whether the complainant can be released pending the adoption of a new decision.
Author's response	None

Further action taken	On 3 May 2006 (during the session of the Committee against Torture), a member of the Secretariat had an informal meeting with Mr. José Burneo, Executive Secretary of the National Human Rights Council of Peru and Mr. Patricio Rubio, legal advisor at the Human Rights Directorate of the Ministry for Foreign Affairs. Messrs. Burneo and Rubio were in Geneva for the examination of Peru's periodic report to CAT. The purpose of the meeting was to transmit the HRC's concern at the lack of response from the State party to the Committee's Views. Mr. Burneo said that his Office was in charge of coordinating the responses to the International bodies on individual complaints. However, in view of the huge amount of cases pending before the Inter-American Commission (about 1500) and the peremptory deadlines they are subjected to, his Office tends to give priority to them. He would nevertheless look into the Committee's Views (copy of which I gave to him) and try to prepare a response. Regarding the *K.N.L.H.* case, he said that the absence of response was deliberate, as the question of abortion was extremely sensitive in the country. His Office was nevertheless thinking of drafting a bill allowing the interruption of pregnancy in cases of anencephalic foetus. Mr. Burneo referred to the question of reparation regarding cases of persons who have been found innocent after being sentenced under the Anti-terrorist decrees, a lot of whom have spent many years in prison. Some of the cases dealt with by the Committee fall in this category. Mr. Burneo said that the existing legislation was unsatisfactory to deal with this issue and, as a result, no compensation or other forms of reparation was provided to the victims.
Case	Quispe Roque, 1125/2002
Views adopted on	21 October 2005
Issues and violations found	Arbitrary detention, faceless judges - Articles 9, and 14
Remedy recommended	In accordance with article 2, paragraph 3 (a), of the Covenant, the State party is required to furnish the author with an effective remedy and appropriate compensation. In the light of the long period that he has already spent in prison and the nature of the acts of which he is accused, the State party should consider the possibility of terminating his deprivation of liberty, pending the outcome of the current proceedings against him. Such proceedings must comply with all the guarantees required by the Covenant.

Due date for State party response	1 February 2006
Date of State party's response	25 May 2006
State party response	The State party informs the Committee that a new trial is under way (in accordance with its obligation to provide an effective remedy). It notes, however, that it is for the Judiciary to determine whether the complainant can be released pending the adoption of a new decision.
Author's response	None
Further action taken	See summary of consultations with the State party above.
Case	Carranza Alegre, Marlem, 1126/2002
Views adopted on	28 October 2005
Issues and violations found	Arbitrary detention, torture and inhuman and degrading treatment, faceless judges - Articles 2 , paragraph 1, 7, 9, 10, and 14.
Remedy recommended	In accordance with article 2, paragraph 3 (a), of the Covenant, the State party is required to furnish the author with an effective remedy and appropriate compensation. In the light of the long period she has already spent in detention and the nature of the acts of which she stands accused, the State party should give serious consideration to terminating her deprivation of liberty, pending the outcome of the current proceedings. Such proceedings must comply with all the guarantees required by the Covenant.
Due date for State party response	6 February 2006
Date of State party's response	25 May 2006
State party response	The State party informs the Committee that the author was acquitted by decision of the Supreme Court of 17 November 2005 and released. It noted that the "Consejo Nacional de Derechos Humanos" (national human rights council) was currently examining the granting of a compensation.
Author's response	By letters dated 13 February and 8 May 2006 the author informed the Committee that on 17 November 2005 the Supreme Court decided her acquittal and that she has been released. She intends to contact the Ministry of Justice in connection with the Committee's recommendation that she should be provided with compensation.

Further action taken	See summary of consultations with State party above.
Case	K.N.L.H, 1153/2003
Views adopted on	24 October 2005
Issues and violations found	Abortion, right to a remedy, inhuman and degrading treatment and arbitrary interference in ones private life, protection of a minor - Articles. 2, 7, 17, 24.
Remedy recommended	In accordance with article 2, paragraph 3 (a), of the Covenant, the State party is required to furnish the author with an effective remedy, including compensation. The State party has an obligation to take steps to ensure that similar violations do not occur in the future.
Due date for State party response	9 February 2006
Date of State party's response	7 March 2006
State party response	Publication of a Report by the national human rights Council (Consejo Nacional de Derechos Humanos), based on the *K.N.L.H* case. The report proposes the amendment of articles 119 and 120 of the Peruvian Criminal Code or the enactment of a special law regulating therapeutic abortion. The National human rights council has required the Heath Ministry to provide information as to whether the author has been compensated and granted an effective remedy. No such information results from the letters sent by the Health Ministry in reply to the National Human Rights Council.
Further action taken	See summary of consultations with State party above.
State party	**PHILIPPINES**
Case	Cagas, 788/1997
Views adopted on	23 October 2001
Issues and violations found	Right to be tried without undue delay, right to presumption of innocence, and unreasonable delay in pretrial detention - Articles 9, paragraph 3, 14, paragraph 2, 14, paragraph 3 (c)

Remedy recommended	In accordance with article 2, paragraph 3 (a), of the Covenant, the State party is under an obligation to provide the authors with an effective remedy, which shall entail adequate compensation for the time they have spent unlawfully in detention. The State party is also under an obligation to ensure that the authors be tried promptly with all the guarantees set forth in article 14 or, if this is not possible, released.
Due date for State party response	9 May 2002
Date of State party's response	10 February 2006 (The State party had replied on 19 August 2004)
State party response	The Committee will recall that, as set out in its 84th report, the State party submitted that it had not provided information on the merits of this case, prior to consideration by the Committee, as it believed the case to be inadmissible. It then proceeded to respond on the merits. On 3 June 2005, and in response to counsel's submission, the State party informed the Special Rapporteur that on 18 January 2005, the Regional Trial Court of Pili, Camarines Sur, had pronounced its judgement. The accused Cagas, Butin, and Astilero were all found guilty by the trial court of multiple murder, qualified by treachery, for the killing of Dr. Dolores Arevalo, Encarnacion Basco, Arriane Arevalo, Dr. Analyn Claro, Marilyn Oporto and Elin Paloma. Cagas and Antillero were sentenced to *reclusion perpetua* for each of the murders. Butin died before the rendering of the final judgement. On 10 February 2006, the State party submitted that the accused Cagas and Astillero appealed the decision to the Court of Appeal where it remains pending. It submits that the rendition of the judgement was made in accordance with the Committee's recommendation. However, it is not in a position to award the authors with compensation while the case is still before the Court of Appeal. It reiterates that the payment of compensation, under the Republic Act No. 7309, is for those who have been unjustly deprived of their liberty and would hinge on the acquittal of the accused. The corresponding compensation for the time spent in prison would then be determined by the Board of Claims which is under the State party's Department of Justice.
Author's response	None
Case	Carpo, 1077/2002
Views adopted on	28 March 2003
Issues and violations found	Death sentence - Article 6, paragraph 1.

Remedy recommended

In accordance with article 2, paragraph 3 (a), of the Covenant, the State party is under an obligation to provide the authors with an effective and appropriate remedy, including commutation. The State party is under an obligation to avoid similar violations in the future.

Due date for State party response

12 August 2003

Date of State party's response

31 May 2006 (had replied on 5 October 2004)

State party response

On 5 October 2004, the State party had submitted the following. As to the finding of a violation of article 6, paragraph 2, the Committee's finding that the offence of murder entails a very broad definition, "requiring simply the killing of another individual", is incorrect and there exists in the State party's penal code a clear distinction between different types of unlawful killings. Thus, the State party cannot be held liable for arbitrary deprivation of life on the basis of such an unfounded conclusion.

It also submitted that it cannot be concluded that the imposition of the death penalty was made by automatic imposition of article 48 of the Revised Penal Code. Such a conclusion rests on the false assumption that article 48 provides for the mandatory imposition of the death sentence in cases where a single act results in several unlawful killings. It was argued that there is no indication in the phraseology of this provision which indicates that the term "maximum period" alludes to the penalty of death. Article 48 merely prescribes that if one single act results in two or more offences, the penalty for the most serious crime will be imposed i.e. a penalty lower that the aggregate of the penalties for each offence, if imposed separately.

Similarly, the State party submitted that there is nothing in this provision which authorizes local courts to disregard the personal circumstances of the offender as well as the circumstances of the offence in considering cases which involve complex crimes. In its view, no persuasive basis was laid down to justify the conclusion that the imposition of the death penalty upon the authors was made "without regard being able to be paid to the authors' personal circumstances or the circumstances of the particular offence".

Finally, as to the conclusion that the authors did not receive a real review in the Supreme Court, which practically foreclosed the presentation of any new evidence, the State party submitted that this Court is not a "trier" of facts and is not obliged to repeat the proceedings before the trial courts. A review by the Supreme Court is meant to ensure that the conclusions of the trial court are consistent with prevailing laws and procedures. In addition, it added that there is nothing on record to show that the authors were going to present new evidence not previously considered by the trial court.

On 31 May 2006, the State party submitted that the four authors were granted executive clemency. Their death sentences were reduced to *reclusion perpetua*, a lengthy form of imprisonment. However, the Philippine Revised Penal Code, provides that any person sentenced to *reclusion perpetua* shall be pardoned after 30 years.

Further action taken	On 21 July 2005, the Special Rapporteur had held follow-up consultations with a representative of the State party. He noted that two follow-up replies remained outstanding and that other replies might be construed as not being satisfactory, constituting in reality belated merits submissions rather than follow-up submissions. The State party representatives pledged to secure follow-up information in the outstanding cases (1167/2003, Ramil Rayos, and 1110/2002, Rolando) and to seek confirmation as to whether there would be additional follow-up submissions in the other cases, notably in the cases of Wilson (868/1999) and Piandiong (869/1999).
Committee's Decision	In light of the commutation of the author's sentence, the Committee does not intend to consider this matter any further under the follow-up procedure unless the situation changes.
Case	Pagdawayon, 1110/2002
Views adopted on	3 November 2004
Issues and violations found	Death penalty, unfair trial, arbitrary arrest - Articles 6, paragraph 1, 9, paragraphs 1, 2, 3, and 14, paragraph 3 (d).
Remedy recommended	Pursuant to article 2, paragraph 3 (a), of the Covenant, the Committee concludes that the author is entitled to an appropriate remedy including commutation of his death sentence. The State party is under an obligation to avoid similar violations in the future.
Due date for State party response	7 March 2005
Date of State party's response	31 May 2006 (had replied on 27 January 2006)

State party response	On 27 January 2006, the State party had submitted that the Committee's finding that the author is entitled to commutation of his sentence was referred to the Department of Justice on 1 August 2005, to the Executive Secretary and to the Chief Presidential Legal Counsel on 19 January 2006. It recalled that this decision rests in the hand of the President and that all death penalty cases upon completion are automatically forwarded by the Supreme Court to the office of the President for the exercise of his pardoning power. On 31 May 2006, the State party submitted that the author was granted executive clemency. His death sentence was reduced to *reclusion perpetua*, a lengthy form of imprisonment. However, the Philippine Revised Penal Code, provides that any person sentenced to *reclusion perpetua* shall be pardoned after 30 years.
Author's response	None
Committee's Decision	In light of the commutation of the author's sentence, the Committee does not intend to consider this matter any further under the follow-up procedure unless the situation changes.
Case	Rayos, 1167/2003
Views adopted on	27 July 2004
Issues and violations found	Death penalty, unfair trial - Articles 6, paragraph 1 and 14, paragraph 3 (b).
Remedy recommended	In accordance with article 2, paragraph 3 (a), of the Covenant, the State party is under an obligation to provide the author with an effective and appropriate remedy, including commutation of his death sentence. The State party is under an obligation to avoid similar violations in the future.
Due date for State party response	5 December 2004
Date of State party's response	31 May 2006 (had replied on 27 January 2006)
State party response	On 27 January 2006, the State party had submitted that the Committee's finding that the author is entitled to commutation of his sentence was referred to the Department of Justice on 1 August 2005 and to the Executive Secretary and the Chief Presidential Legal Counsel on 19 January 2006. It recalled that this decision rested in the

	hand of the President and that all death penalty cases upon completion are automatically forwarded by the Supreme Court to the office of the President for the exercise of his pardoning power. On 31 May 2006, the State party submitted that the author was granted executive clemency. His death sentence was reduced to *reclusion perpetua*, a lengthy form of imprisonment. However, the Philippine Revised Penal Code, provides that any person sentenced to *reclusion perpetua* shall be pardoned after 30 years.
Author's response	None
Committee's Decision	In light of the commutation of the author's sentence, the Committee does not intend to consider this matter any further under the follow-up procedure unless the situation changes.
Case	Wilson, 868/1999
Views adopted on	30 October 2003
Issues and violations found	Mandatory death penalty for rape after unfair trial - "most serious" crime. Compensation after acquittal - Articles 7, 9, paragraphs 1, 2, and 3, 10, paragraphs 1, and 2.
Remedy recommended	In accordance with article 2, paragraph 3 (a), of the Covenant, the State party is under an obligation to provide the author with an effective remedy. In respect of the violations of article 9 the State party should compensate the author. As to the violations of articles 7 and 10 suffered while in detention, including subsequent to sentence of death, the Committee observes that the compensation provided by the State party under its domestic law was not directed at these violations, and that compensation due to the author should take due account both of the seriousness of the violations and the damage to the author caused. In this context, the Committee recalls the duty upon the State party to undertake a comprehensive and impartial investigation of the issues raised in the course of the author's detention, and to draw the appropriate penal and disciplinary consequences for the individuals found responsible. As to the imposition of immigration fees and visa exclusion, the Committee takes the view that in order to remedy the violations of the Covenant the State party should refund to the author the moneys claimed from him. All monetary compensation thus due to the author by the State party should be made available for payment to the author at the venue of his choice, be it within the State party's territory or abroad.
Due date for State party response	10 February 2004

Date of State party's response

27 January 2006 (It had replied on 12 May 2005)

State party response

The Committee will recall that, as set out in its 84th report, the State party submitted that it was "disinclined" to accept the Committee's findings of facts, more particularly its assessment of evidence. It submitted that the findings rested on an incorrect appreciation of the facts and contested the finding that the compensation provided was inadequate. It submitted that the author failed to discharge the burden of proof; ex parte statements made by the complainant are not considered evidence and do not constitute sufficient proof of the facts alleged. An investigation conducted by the City jail Warden of the Valenzuela City Jail, where the author was confined, disputed all allegations made by the author. The author had failed to provide specific acts of harassment to which he was supposedly subjected to while in prison and did not identify the prison guards who allegedly extorted money from him. As the author had already flown home while the communication was pending before the Committee he could not have feared for his security by naming those who had allegedly ill-treated him. It reiterated its submission that the author failed to exhaust domestic remedies. Finally, it considered that the compensation provided is adequate that the author had not yet sent an authorized representative to claim the checks on his behalf and that by insisting that the State party make available to the complainant all monetary compensation due to him, "the Committee might have exceeded its competency and caused great injustice to the State party".

On 27 January 2006, the State party submits that the Views were sent to the Department of Justice and the Department (DOJ) of Interior and Local Government (DILG) for appropriate action last 10 August 2005. DOJ exercises supervision over the Bureau of Immigration while DILG exercises supervision over city jails. An investigation was carried out in 2005 by the City Jail Warden of the Valenzuela City Jail where Mr. Wilson was confined. The investigation revealed the following: (1) The Valenzuela City Jail has no "cages" in which the author could have been confined upon his arrest; and (2) There is no record of a serious shooting incident of an inmate which supposedly occurred ensuring the author's detention and which supposedly traumatised the author. According to the investigation results, the only incident on record was a non-fatal shooting on 17 June 1996 of an inmate who was shot by his jail guard when the former tried to escape form detention. Finally, it submits that the author failed to provide specific acts of harassment to which he was supposedly subjected while in prison and failed to identify the prison guards and officials who allegedly harassed and extorted money from him.

Author's response

On 9 February 2006, the author submitted that the procedure currently under consideration is that of follow-up and that therefore it is inappropriate to resubmit arguments on the merits. He requests information on the current status of follow-up in this case.

On 3 May 2006, the author's counsel responded to the State party's response of 27 January 2006. He submits that the State party's response is inappropriate as 1. it was limited to an investigation only and 2. the investigation conducted was not prompt, comprehensive and/or impartial. Neither the City of Jail Warden, which conducted the investigation nor the DILG which oversaw it, can be considered an external and therefore impartial mechanism. In addition, it is not possible to assess the promptness and effectiveness of the investigation as the authorities never informed the complainant about the investigation, including when it would take place and why the investigation was closed. Counsel points to treaty body jurisprudence as well as jurisprudence of the ECHR for the proposition that a complainant should be invited to take part in such an investigation and to receive information about its progress and outcome. As to the conduct of the investigation, Counsel submits that it is clear that the author's complaints were disregarded. The claim that the author failed to provide specific acts of harassment or to identify the persons who subjected him to harassment is an attempt to reduce the State party's duty to conduct a thorough investigation – it is precisely the purpose of such investigations to establish such facts. In any event, these claims are untrue and Counsel refers to the communication itself in which the author sets out in detail his complaints.

Counsel highlights that failure of the State party to provide information about the compensation with regard to the breaches of articles 7, 9 and 10 as well as the refunding of the moneys claimed from the author as immigration fees and with respect to the guarantees of non-repetition. Counsel also highlights the authors concerns with the measures the State party should take to prevent similar violations in the future.

State party **RUSSIAN FEDERATION**

Case Platonov, 1218/2003

Views adopted on 1 November 2005

Issues and violations found Judicial control pretrial detention - Article 9, paragraph 3

Remedy recommended Pursuant to article 2, paragraph 3 (a), of the Covenant, the Committee considers that the author is entitled to an effective remedy, including appropriate compensation. The State party is also under an obligation to take effective measures to ensure that similar violations do not recur.

Due date for State party response 1 February 2006

Date of State party's response 10 March 2006

State party response

The State party recalls the facts of the case. As to the Committee's findings, the State party observes, first, that the Constitution of the Russian Federation of 1993 contains a similar provision of article 9, paragraph 3, of the Covenant. Under its provision, "Arrest, detention and custody shall be allowed only by an order of a court." (article 22). According to the State party, the Committee has thus correctly noted in its Views that under the Criminal Procedure Code of the Russian Soviet Socialist Republic (still into force in 1999), detention was ordered not by a court, but by an investigator with the approval of a prosecutor. However, by Law of 23 May 1993, two new articles were introduced in the Criminal Procedure Code (220-1 and 220-2). Pursuant to their provisions, decisions of detention/ to extend detention could be appealed to court. Mr. Platonov, as a detainee, had thus the right to challenge his detention in court. However, neither he nor his lawyer presented any claim to court in this respect; the Committee has correctly declared this claim unsubstantiated.

The State party further explains that on 22 November 2001, it adopted a new Criminal Procedure Code (CPC) that entered into force on 1 July 2002. Pursuant to its article 108, custody (as a preventive measure) is applicable only under a court decision. In addition, such preventive measures can only be applied against suspects or accused in relation to crimes punished by more than two years of imprisonment. Thus, the State party has established court control over the lawfulness and justification of detention.

The State party adds that the new CPC also introduced the following time limits for custody.

1. The general rule is that in the case of investigation of a criminal case, custody cannot exceed two months. In the event that the preliminary investigation needs to be prolonged, and in the absence of reasons to free the accused, custody may be prolonged up to six months. Custody may be prolonged up to twelve months in relation to certain grave crimes, such as murder, terrorism, etc. All decisions to prolong custody are taken exclusively by a court. Only in exceptional cases, in relation to particularly grave crimes, an investigator (acting with the authorisation of the Prosecutor General) may request the Court to extend custody up to 18 months.

2. Article 225 of the CPC provides court control over pretrial detention of accused whose cases are examined by a court.

The State party concludes that thus the Committee's recommendations are fully implemented. According to the State party, the CPC of the Russian Federation fully complies with both the requirements of ICCPR and the Russian Constitution in this relation.

The new criminal procedure legislation established a right to rehabilitation, including a right to compensation (chapter 18 CPC). Article 133 of the CPC provides a right to compensation for everyone who has been unlawfully subjected to coercive measures with respect to a criminal case. The list of coercion measures is given by chapters 12-14 of the CPC, and includes also arrest, detention as a suspect, and custody.

The State party concludes that the author's allegations were substantially examined during the pretrial investigation and in court, and were not confirmed.

State party

SPAIN - GENERAL INFORMATION ON CASES RELATING TO ARTICLE 14, PARAGRAPH 5, VIOLATIONS

Date of State party's response

28 February 2006 (Response to a letter from the Secretariat on the implementation of law 19/2003 dated 7 December 2005)

State party response

The State party submits that:

- Law 19/2003 was approved on 23 December 2003;
- It generalizes the second instance in Spain;
- Its purposes were: (1) to reduce the caseload of the Second Chamber of the Supreme Court, and (2) to resolve the dispute which arose as a result of the Committee's Views adopted on 20 July 2000, in which the Committee asserted that the system of cassation was in violation of the Covenant;
- To became operative, the amendments of Law 19/2003 require the passing of implementing legislation, i.e., the approval of the "Comprehensive Law by which: Procedural Law is put in conformity with the Comprehensive Law 6/1985, of 1 July, on the Judicial Branch; the remedy of cassation is reformed and the second instance is generalized". This draft law is currently at the Chamber of Deputies, and its discussion by the Commission on Justice will take place next February (sic);

- Once approved, the new law will bring about the generalization of second instance in Spain. The system of appeal will be as follows:

  (a) Judgements handed down by Criminal judges and Provincial Courts (*Audiencias Provinciales*): appeal to the Provincial Courts and the Criminal and Civil Chamber of the Superior Tribunal in each autonomous community, respectively;

  (b) Judgements handed down by Criminal judges and Provincial Courts, within the framework of simplified proceedings (*procedimiento abreviado*): appeal to the Criminal Chamber of the National Court (*Sala de lo Penal de la Audiencia Nacional*) and to the Chamber of Appeals of the National Court (*Sala de Apelación de la Audiencia Nacional*);

  (c) Judgements of the Provincial Courts concerning ordinary proceedings: appeal to the Criminal and Civil Chamber of the Superior Tribunal in each autonomous community;

  (d) Judgements of the Second Chamber of the National Court: appeal to the Chamber of Appeals of the National Court;

  (e) Judgements of the Second Chamber of the Supreme Court: appeal to the Chamber of Appeals of the Supreme Court;

  (f) Judgements of the Criminal and Civil Chambers of the Superior Tribunal in each autonomous community: appeal to the Chamber envisaged in future article 846 bis 3 of the new law;

  (g) Judgements of the President of Provincial Courts, when the latter act as Courts of Jury (Tribunal de Jurado): appeal to the Criminal and Civil Chambers of the Superior Tribunal in each autonomous community;

- To sum up, the entry into force of the amendments envisaged in Law 19/2003, will take place with the approval of the "Comprehensive Law by which: Procedural Law is put in conformity with the Comprehensive Law 6/1985, of 1 July, on the Judicial Branch; the remedy of cassation is reformed and the second instance is generalized."

Case	Gómez Vásquez, 701/1996
Views adopted on	20 July 2000

Issues and violations found	Denial of an effective appeal against conviction and sentence for the most serious crimes (incomplete judicial review) - Article 14, paragraph 5.
Remedy recommended	Effective remedy, author's conviction must be set aside unless it is subjected to review in accordance with article 14, paragraph 5.
Due date for State party response	14 November 2000 - The State party has previously responded.
State party response	On 16 November 2004, the State party submits that on 14 December 2001, the Plenary of the Supreme Court decided to dismiss the application to have the author's conviction quashed. This is a landmark decision of the Supreme Court on the compatibility of the Spanish cassation with the requirements of article 14, paragraph 5, of the Covenant.
Author's response	By letter of 5 April 2006, counsel informs the Committee that a draft amendment act is under way, which will tackle "the issue of the second instance" for persons sentenced by the "Audiencia Provincial" or "Audiencia Nacional". Counsel claims that, since this amendment shall only apply to decisions adopted after its entry into force, cases like Gómez Vázquez and Sineiro will not get the benefit of it. By letter of 17 April 2006, counsel insists that the State party has not complied with the Committees Views and as a proof thereof, he notes that the victim has been refused pardon and is still serving his sentence.
Case	Ruiz Agudo, 864/1999
Views adopted on	31 October 2002
Issues and violations found	A delay of 11 years in the judicial process at first instance and of more than 13 years until the rejection of the appeal violates the author's right under article 14, paragraph 3 (c), of the Covenant, to be tried without undue delay.
Remedy recommended	An effective remedy, including compensation for the excessive length of the trial. The State party should adopt effective measures to prevent proceedings from being unduly prolonged and to ensure that individuals are not obliged to initiate a new judicial action to claim compensation.
Due date for State party response	9 February 2003
Date of State party's response	

State party response	None
Author's response	On 1 August 2005, counsel transmitted to the Committee copy of the judgement, dated 24 June 2005, by which the *Audiencia Nacional* ordered the payment of 600 euros to the author as reparation for the misfunctioning of the judicial system of which he was a victim. Such judgement was the result of the administrative appeal filed by the author in order to obtain the implementation of the Committee's recommendations. The author claims that the amount of the reparation ordered by the *Audiencia* is merely symbolic and cannot be considered sufficient.
Case	Terón, 1073/2002
Views adopted on	5 November 2004
Issues and violations found	Although the State party's legislation provides in certain circumstances for the trial of an individual, because of his position, by a higher court than would normally be the case, this circumstance alone cannot impair the defendant's right to review of his conviction and sentence by a court. Article 14, paragraph 5.
Remedy recommended	An effective remedy, including adequate compensation.
Due date for State party response	9 February 2005
State party response	None
Author's response	By letters dated 7 March 2005 and 11 July 2005, counsel informed the Committee that no measures had been taken to implement the Committee's recommendations.
Case	Hill, 526/1993
Views adopted on	2 April 1997
Issues and violations found	The author's were not given any food during the first five days of police detention; they were not granted release on bail; their right to defend themselves was not respected; their right to have their conviction and sentence reviewed was denied to them - Articles 9, paragraph 3; 10; 14, paragraphs 3 (c) and 5.

Remedy recommended	An effective remedy, entailing compensation.
Due date for State party response	On 9 October 1997, the State party had provided information on the possibility of seeking compensation.
Date of State party reply	2 November 2005 (Latest information)
State party response	The Committee will recall that, as set out in its 84th report, the State party submitted, on 16 November 2004, that the author filed an application to have his conviction and sentence quashed. The Constitutional Court dismissed the application, but indicated that the author should file an appeal. The author filed an appeal with the Second Chamber of the Supreme Court, which on 25 July 2002 decided to set aside the decision of the appellate court (Supreme Court) and again rejected the author's original appeal (cassation). This second judgement of the Supreme Court, unlike the previous judgement duly analyzed the evidence, prior to rejecting the appeal (cassation). The author filed an appeal (*amparo*) with the Constitutional Court which is still pending. He also filed a suit in law against the Ministry of Justice for wrongful administration of justice. This claim was dismissed and an appeal with the National Court is still pending. On 2 November 2005, the State party submitted that Mr. Hill was re-tried by the Supreme Court, which upheld his conviction. Although there is an *amparo* before the Constitutional Court still pending, his extradition could take place at any time.
Author's response	As the Committee will recall from its 85th report, on 10 October 2005, Mr. Michael Hill had informed the Committee that his brother Brian had been arrested on 8 October 2005 in Lisbon on an international arrest warrant issue by the court in Valencia which had tried the two brothers in the early 1990s. Allegedly, the arrest warrant was related to the facts at the basis of the concluded case. It stemmed from the contention that the authors absconded from Spain immediately upon their conditional release from custody. This information was transmitted to the State party, for comments.
State party	**SRI LANKA**
Case	Jayawardena, 916/2000
Views adopted on	22 July 2002
Issues and violations found	Death Threats against Member of Parliament - Article 9, paragraph 1.

Remedy recommended	"an appropriate remedy"
Due date for State party response	22 October 2002
Date of State party's response	9 September 2004
State party response	The Committee will recall, as set out in the 83rd and 84th reports that, pursuant to the Committee's Views, the State party made further inquiries of the author. Since he had been unable to identify the persons who had allegedly threatened him, no further legal action was taken. Nevertheless, the Government had agreed to provide additional protection for him if and when it became necessary. No such requests for additional protection had been made by him. Following the author's response of 18 October 2004, the State party submitted further comments on 24 March 2005. It stated that the deployment of security personnel for VIPs by the Police is effected on the basis of circular instructions issued by the Inspector General of Police. Accordingly, a Member of Parliament is entitled only to two security personnel. However, in consideration of his request, two additional security personnel were provided to him, increasing the total strength of his security staff to four.
Author's response	The Committee will recall, as set out in the 84th that, on 18 October 2004, the author responded to the State party's submission. He stated that the State party had taken no steps to investigate his complaints of death threats. He had requested additional security from the State party but had not received a positive response, in fact his security has been reduced. The President had not taken any steps to withdraw or to rectify the allegations which she made against him. He submitted that he was again elected as a Member of Parliament at the elections held in April 2004. As the then shadow Minister of Rehabilitation, Resettlement and Refugees, he made representations regarding the violations of human rights of opposition Members of Parliament. For this reason, he alleged that his life has become more vulnerable. He requested the Committee to inform the President of Sri Lanka to provide him with additional security as requested, as early as possible, and to continue to investigate his complaints. On 10 January 2006, the author informed the Committee that Mr. Pararajasingham, a Member of Parliament from the Tamil National Alliance (TNA), was killed on 24th December by an unidentified gunman. He had been canvassing with the author to find a peaceful settlement to the ethnic conflict in Sri Lanka. The author submits that there were reliable reports that Mr. Pararajasingham was targeted by the Karuna group (an anti-LTTE

	group in the Eastern Province). The author believes that the same group has targeted him and requests the Committee to take "appropriate action to protect his life".
Case	Fernando, 1189/2003
Views adopted on	31 March 2005
Issues and violations found	Unfair trial – Article 9, paragraph 1.
Remedy recommended	In accordance with article 2, paragraph 3 (a), of the Covenant, the State party is under an obligation to provide the author with an adequate remedy, including compensation, and to make such legislative changes as are necessary to avoid similar violations in the future. The State party is under an obligation to avoid similar violations in the future.
Due date for State party response	28 July 2005
Date of State party's response	8 August 2005
State party response	It submits that at the time the State party became a party to the Optional Protocol it was not envisaged that the competence of the Committee would extend to a consideration, review or comment of any judgement given by a competent Court in Sri Lanka, in particular on findings of fact and on sentences imposed by such Court upon a full consideration of evidence placed before it. It submits that as the independence of the judiciary is guaranteed under the Constitution the Government has no control over the judicial decisions given by a competent Court, nor can it give directions with regard to future judgements of such Court. While respecting the Views of the Committee, the State party is unable to consider the payment of compensation to any persons on the basis of a conviction and sentence passed by a competent court in Sri Lanka. Payment of compensation on the basis of the conviction and sentence would be tantamount to undermining the authority of the Supreme Court, which convicted and sentenced the author and would be construed as an interference with the independence of the judiciary. Likewise, the State party cannot prevent similar judgements of this nature as it has no control over future decisions or judgements of the Court, nor can it give directions to the Supreme Court in relation to any future judgements. Thus, the State party submits that it is unable to give effect to the Views of the Committee as set out in paragraph 11 of

the Views. With regard to the need for legislation change, the State party informs the Committee that it will refer the matter to the Law Commission of Sri Lanka for its consideration.

Author's response

The author provides a detailed commentary of 20 pages on the State party's response. He contests the State party's argument that the Views are not binding. He refers to the customary law principle of *pacta sunt servada* enshrined in Article 26 of the Vienna Convention on the Law of Treaties confirming that every treaty is binding on states parties and must be performed by them in good faith. In addition, the State party acceded to the Optional Protocol, which gives the Committee authority to consider individual complaints, without reservations.

As the State party did not make any reservations to the ICCPR (in particular article 2) or OP, it cannot argue that the Views have no application to the domestic legal context in the absence of specific legal provisions in its national law. He provides a significant amount of research on Sri Lankan jurisprudence (provided on request) to demonstrate that international obligations are buttressed by judicial incorporation of international human rights standards in a growing body of jurisprudence in Sri Lanka since the late eighties. From another standpoint, the relevance of international legal standards has also been firmed by the Directive Principles of State Policy, which though non-justiciable in Sri Lanka's constitutional context, has a direct impact on legal policy in the country. Article 27 (15) of these Principles mandate the State to "… endeavor to foster respect for international law and treaty obligations in dealings among nations". As to the argument on the independence of the judiciary, the author points to the Committee's GC on article 2, and to the Committee's Views. He provides jurisprudential to demonstrate that it is a long standing principle of international law that the State is regarded as a unity and that its internal divisions, whether these are territorial, organizational or other, cannot be invoked in order to avoid its international responsibility. In addition, he argues that complying with international obligations is not an interference with independence of the judiciary, which would take place if the government, of its own motion, seeks to undermine a legal judgement or similar judicial act. The fact that the Committee's decisions stand to be implemented through the executive does not mean that, from the perspective of independence of the judiciary, these are decisions of the executive. The payment of compensation does not qualify as interference with the independence of the judiciary, as defined by article 161 (1) of the State party's Constitution. Interpreting one provision of a Constitution requires accommodation between all of its provisions.

As to the argument on the impossibility of the State party preventing such decisions, the author submits that it is legitimate for the other branches of government, particular the legislature, to set standards which the judiciary should apply, through the adoption of laws. It would also be legitimate for such laws to regulate contempt of court.

As to the information that the State party has forwarded the Views to the Law Commission for "consideration", the author states that this will not be sufficient to meet its obligations as it will only result in a process which has already proved to be futile. It is submitted that this part of the response is a violation of its obligations in as much as the commitment envisaged therein envisaged a specific undertaking on the part of the State party, in this instance to enact a Contempt of Court Act. Such law is alleged to be pressing as contempt is currently interpreted and applied by the domestic courts in an extremely restrictive manner (jurisprudence provided).

Committee's Decision	The Committee regards the State party's response as unsatisfactory and considers the follow-up dialogue ongoing.
Case	Joseph, 1249/2004
Views adopted on	21 October 2005
Issues and violations found	Discrimination on religious grounds – Articles 18, paragraph 1 and 26.
Remedy recommended	The State party is under an obligation to provide the authors with an effective remedy giving full recognition to their rights under the Covenant. The State party is also under an obligation to prevent similar violations in the future.
Due date for State party response	29 January 2006
Date of State party's response	22 June 2006
State party response	The State party submits that it must respect and act in accordance with the Constitution of the Republic and within the framework of its domestic legal system. It is not in a position to act contrary to any decision given by any court in Sri Lanka. The Supreme Court is the highest court in Sri Lanka and its determination is final and binding both on the Government of Sri Lanka, and the Parliament. Therefore, there is no remedy that could be afforded by the Government to the authors. However, in the event that the same Bill or even a similar Bill is represented in Parliament and the constitutionality of such Bill is challenged, the Government can apprise the Supreme Court of the Views.

State party	**SURINAME - GENERAL INFORMATION ON ALL CASES**
Case	Baboeram et al., 146/1983 and Kamperveen, Riedewald, Leckie, Demrawsingh, Sohansingh, Rahman, Hoost, 148 - 154/1983
Views adopted on	4 April 1984
Issues and violations found	Arbitrary execution - Article 6, paragraph 1
Remedy recommended	The Committee therefore urges the State party to take effective steps (i) to investigate the killings of December 1982; (ii) to bring to justice any persons found to be responsible for the death of the victims; (iii) to pay compensation to the surviving families; and (iv) to ensure that the right to life is duly protected in Suriname.
Due date for State party response	5 June 1991
Date of State party's response	The State party had responded on 27 August 1997
State party response	It acknowledges in principle that appropriate compensation should be given to the victims of human rights violations, including the authors' families, and that the Government will initiate "a nation-wide discussion on all aspects of human rights (political and economic)". The results of these consultations would be forwarded to the Committee as soon as they become available.
Further action taken	On 14 March 2006, Messrs. Ando and Rivas Posada, Kristen Boon and a member of the Secretariat had a follow-up meeting with the ambassador of Suriname, Ewald Wensley Limon. Follow-up to the concluding observations of 2004, notably on the priority concerns expressed in paragraphs 8, 11 and 14, and the status of implementation, or lack thereof, of the Views in case Nos. 146 and 148 to 154/1983 (*Baboeram et al. v. Suriname*) was discussed. Both Mr. Rivas Posada and Mr. Ando stressed the bona fide duty on the Surinamese government to provide meaningful follow-up replies on the concluding observations of 2004 and on the Views in the above case. Especially in the case of the Views on *Baboeram et al.*, the follow-up discussion had been going on for many years. Ambassador Limon indicated that a team of 'legal experts' in the capital had been tasked with working on human rights issues before international bodies, and that this team was working on follow-up issues. In addition, the *MAHUINA* case [mentioned during the discussion on the second report in 2004] was currently pending before

the Inter-American Commission on Human Rights, and considerable ground of relevance to the victims of past human rights violations was covered in this case (e.g. compensation to victims).

The Ambassador indicated that he would solicit follow-up replies from the authorities in Paramaribo by the end of June, but at the same time indicated that he could not guarantee that a reply would be forthcoming in time for inclusion in the next annual report (A/61/40).

State party	**TAJIKISTAN**
Case	Aliboev, 985/2002
Views adopted on	18 October 2005
Issues and violations found	Death penalty, unfair procedure - Articles 6, paragraph 2, 7, 14, paragraph 1, 3 (d), (g), and 14, paragraph 5.
Remedy recommended	Under article 2, paragraph 3 (a), of the Covenant, the State party is under an obligation to provide the author with an appropriate remedy, including appropriate compensation. The State party is also under an obligation to prevent similar violations in the future.
Due date for State party response	1 February 2006
Date of State party's response	2 February 2006
State party response	The Committee will recall that, as set out in its 84th report, on October 2004 the Secretariat had met with a Tajik delegation in the context of individual complaints, during which the issue of follow-up to Views was considered. The delegation confirmed that up to 2002, information sent to the Mission in New York was not forwarded to its capital. By note verbale of 2 February 2006, the State party affirmed that the OHCHR notes verbales mentioned in the Committee's decision (dated respectively 11 July 2001, 5 November 2001, 19 December 2002, and 10 November 2004) had never been received by the State party's Ministry of Foreign Affairs.
Author's response	None
Case	Boymurodov, 1042/2001
Views adopted on	20 October 2005

Issues and violations found	Unfair trial resulting in death penalty, denial of legal access, torture, uneven criminal procedure - Articles 7, 9, paragraph 3, 14, paragraph 3, (a) and (g).
Remedy recommended	Pursuant to article 2, paragraph 3 (a), of the Covenant, the Committee considers that the author's son is entitled to an appropriate remedy, including adequate compensation.
Due date for State party response	1 February 2006
Date of State party's response	None
State party response	None
Author's response	By letter of 1 February 2006, Mr. Abdulkarim Boymumodov, the father of Mustafakul Boymurodov, recalls the facts of the case - his son was initially sentenced to death following an unfair trial, with use of torture during the preliminary investigation - and claims that nothing has happened since the adoption of the Committee's Views. He affirms that he had filed a complaint with the Supreme Court, which is still pending. The Supreme Court informed him that it had received the Committee's Views.
State party	**UZBEKISTAN**
Case	Siragev, 907/2000
Views adopted on	1 November 2005
Issues and violations found	Death penalty after unfair trial - articles 7 and 14, 3 (b)
Remedy recommended	In accordance with article 2, paragraph 3 (a), of the Covenant, the State party is under an obligation to provide Mr. Siragev with an effective remedy. The Committee notes that violation of article 6 was rectified by the commutation of Mr. Siragev's death sentence. The remedy could include consideration of a further reduction of his sentence and compensation. The State party is also under an obligation to prevent similar violations in the future.
Due date for State party response	7 February 2006

Date of State party's response	23 January 2006
State party response	The State party informed the Committee that the Supreme Court of Uzbekistan examined the Committee's Views. It considers that Siragev's sentence is correct, taking into account the totality of the evidence against him. The investigation and court's proceedings of the criminal case were held in accordance with the provisions of the criminal procedure legislation. The Court explains that it cannot agree with the contention that the author was subjected to physical measures of pressure during the preliminary investigation. The Supreme Court "categorically" disagrees with the contention that the commutation of the author's death sentence was made to disguise irregularities that occurred during the court trial. The State party adds that the sentence was commuted as the author repented for the crimes committed. Pursuant to Presidential Amnesty Decrees, Siragev's sentence was reduced, and he was release, in application of the principles of humanism and justice, and also taking into account the author's positive behavior in prison.
Author's response	On 5 December 2005, the author's mother informed the Committee that her son's death sentence had been commuted and that he was supposed to be released on 8 December 2005. She thanked the Secretariat and the Committee for the action taken.
Committee's Decision	In light of the commutation of the author's sentence, the Committee does not intend to consider this matter any further under the follow-up procedure unless the situation changes.
State party	**ZAMBIA**
Case	Chongwe, 821/1998
Views adopted on	25 October 2000
Issues and violations found	Articles 6, paragraph 1, and 9, paragraph 1 - Attempted murder of the chairman of the opposition alliance.
Remedy recommended	Adequate measures to protect the author's personal security and life from threats of any kind. The Committee urged the State party to carry out independent investigations of the shooting incident, and to expedite criminal proceedings against the persons responsible for the shooting. If the outcome of the criminal proceedings reveals that persons acting in an official capacity were responsible for the shooting and hurting of the author, the remedy should include damages to Mr. Chongwe.

Due date for State party response	8 February 2001
Date of State party's response	28 December 2005
State party response	The Committee will recall that, as set out in the FU report from 10 March 2003, the State party had responded on 10 October and 14 November 2001. It contended that the Committee had not indicated the quantum of damages payable and provided copies of correspondence between its Attorney-General and the author, in which the author was provided assurances that the State party would respect his right to life and invited him to return to its territory. As to the issue of compensation, the Attorney-General indicated to the author that this would be dealt with at the conclusion of further investigations into the incident, which had been hindered by the author's earlier refusal to cooperate. By letter of 28 February 2002, the State party noted that the domestic courts could not have awarded the quantum of damages sought, that the author had fled the country for reasons unrelated to the incident in question, and that, while the Government saw no merit in launching a prosecution, it was open to the author to do so. By note verbale of 13 June 2002, the State party reiterated its position that it was not bound by the Committee's decision as domestic remedies had not been exhausted. The author chose to leave the country of his own will, but remained at liberty to commence proceedings even in his absence. In any event, the new President had confirmed to the author that he was free to return. Indeed the State hoped that he would do so and then apply for legal redress. Mr. Kaunda, who was attacked at the same time as the author, is said to be a free citizen carrying on his life without any threat to his liberties. On 28 December 2005, the State party provide the following information. It stated that it had offered the author 60,000 US dollars on a without prejudice basis. The author had rejected the offer, which is more than adequate under Zambian law, particularly in light of the fact that Zambia is one of the 49 countries classified by the United Nations as Least Developed Countries. In spite of the offer, the author is still at liberty to commence legal proceedings in the Zambian Courts over this matter. As an act of good faith, the Zambian government will waive the statue of limitations of his case and allow this matter to be heard in courts of law.
Author's response	The Committee will recall that, as set out in the March 2003 Follow-Up Report Follow-up, the author had referred to the State party's failure to provide him with a remedy on 5 and 13 November 2001.

In March 2006 (letter undated), the author responded to the State party's submission. It appears that the author returned to Zambia in 2003. He submits that he does not intend to make any new claims in the Zambian courts. Although he recognizes the efforts being made by the judiciary to improve he states that the problems are not yet solved. Thus, he would have no confidence that a claim would be handled appropriately by the courts. To begin such a complaint nearly 10 years after the incident would be useless. It would be impossible to conduct such an investigation on his own and would fear for his safety in doing so. In any event, he is not interested in finding the particular "minion of the Zambian Government" who tried to kill him.

The author submits that the State party has not implemented the Views and has not provided him with security. He submits that the government made no effort to help him and his family resettle from Australia back to Zambia and refers to the offer of compensation as "petty cash" which he is obliged to receive on a "like it or lump it basis". He says that he has no intention of negotiating with the Zambian government on the basis of the State party's response of 28 December 2005.

Committee's Decision	To be considered by the Committee during the eighty-eighth session.
Case	1132/2002, Chisanga
Views adopted on	18 October 2005
Issues and violations found	Right to life, ineffective remedy on appeal and ineffective remedy with respect to commutation - articles 14, paragraph 5 together with articles 2; 7; 6, paragraph 2; and 6, paragraph 4 together with article 2.
Remedy recommended	To provide the author with a remedy, including as one necessary prerequisite in the particular circumstances, the commutation of the author's death sentence.
Due date for State party response	9 February 2006
Date of State party's response	17 January 2006
State party response	As to the author's sentence, the State party says that it had provided the HRC with the Supreme Court Judgement dated 5 June 1996 which upheld the sentence of death for aggravated robbery and also convicted the accused to an additional 18 years on the count of attempted murder. Therefore, Zambia's view is that, if the sentence clearly indicates two different counts and two different sentences given for each count

respectively, there can be no confusion. The State party quotes from section 294 of its Penal Code and affirms that the Supreme Court cannot reduce the sentence of death if it finds that the offence contained in Section 294 (2) - namely felony of aggravated robbery where the offensive weapon or instrument is a firearm, or where the offensive weapon or instrument is not a firearm and grievous harm is done to any person in the course of the offence - was committed.

Besides, Zambia acknowledges the "possibility" that the complainant may have been transferred from death row to the long term section of the prison. Zambia explains that this constitutes "deterrent sentencing", that is to say, the convict is required to perform the shorter sentence before being subjected to the more severe one when sentenced on more than one count. Zambia affirms that "deterrent sentencing" is a recognized form of punishment under the common law system and that, therefore, Zambian courts are within their mandates when imposing such sentences. According to the State party, the alleged confusion by the complainant was contrived in bad faith and is meant to disparage Zambia's well established and respected judicial system.

The State party affirms that the right to appeal in its judicial system is not only guaranteed under the Constitution but is also effectively implemented, because in the offences of treason, murder and aggravated robbery (carrying the death penalty) an accused person is, without discrimination, automatically granted the right to appeal to the Supreme Court by the High Court. Regarding the communication of the Master of Supreme Court that purportedly reduced the complainant's sentence, Zambia says that the communication may have been conveying the sentence by the Supreme Court for the count of attempted murder.

The State party states that the accused was taken to the long term section of the prison to serve the 18-year sentence for attempted murder. It adds that there is no record that the author was taken back to death row after 2 years and requests him to prove this allegation.

The State party considers that what constitutes one of the most serious crimes is a subjective test and depends upon a given society. Zambia claims that, in the State of Zambia, crimes of murder or aggravated robbery are widespread and, therefore, not to consider them as serious crimes defeats fundamental rights such as the right to life, security and liberty of the person. Zambia further states that the HRC's suggestion that since the victim did not die the complainant should not be sentenced to death is an affront to the very essence of human rights.

The State party submits that there is on Presidential decree giving amnesty to all prisoners on death row. What the President is said to have declared publicly is that he will not sign any death warrant during his term. Zambia further affirms that prisoners can still apply for clemency according to the terms of the Constitution. Such applications are dealt with by the "Committee on the Prerogative of Mercy" chaired by the vice President. Zambia finally states that no death sentence has been carried out since 1995, and that there is a moratorium on the death penalty in Zambia.

Author's response None

Committee's Decision The Committee notes that the State party's argument on admissibility should have been included in its comments on the communication prior to consideration by the Committee.

The Committee regards the State party's response as unsatisfactory and considers the follow-up dialogue ongoing.
